THE INDIAN LAW REPORTS,

CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA NOT SUBJECT TO ANY HIGH COURT.

REPORTED BY

Privy Council ... ... C. BOULNOIS, *Middle Temple.*

High Court, Calcutta ... J. V. WOODMAN, *Middle Temple.*
T. A. PEARSON, *Inner Temple.*
H. T. HYDE, *Inner Temple.*
A. A. CASPERSZ, *Lincoln's Inn (Offg.)*

VOL. XXI.

JANUARY TO DECEMBER 1894.

Published under the Authority of the Governor-General in Council,
BY THE SUPERINTENDENT, GOVERNMENT PRINTING IN BENGAL,
AT THE SECRETARIAT PRESS,
10, LYON'S RANGE, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
AND AT THE BOMBAY AND ALLAHABAD GOVERNMENT BOOK DEPOTS.

PAGE

tness—*continued.*

his defence when the case of the second accused is adverse to that of the first. RAM CHAND CHATTERJEE *v.* HANIF SHEIKH 401

——*Examination of witnesses—Cross-examination—Right of accused to cross-examine witnesses for the prosecution before commitment—Criminal Procedure Code* (1861), *s.* 194; (*X of* 1872), *s.* 191; (*X of* 1882), *ss.* 210, 256, 257, 288—*Criminal Procedure Code*, 1882, *s.* 364—*Recording statement of accused by Magistrate.*] An accused person has the right to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The fact that the Criminal Procedure Code of 1872 contained an express provision to that effect, which was omitted in the Code of 1882, together with the provision of sections 210 and 256 of the latter Code, must not be taken to show an intention on the part of the Legislature to deprive an accused of that right. The express provision in the Code of 1872 was probably thought by the Legislature when framing the Code of 1882, as being redundant, seeing that the Evidence Act of 1872, which was passed at the same time as the Criminal Procedure Code of 1872, made sufficient provision on the subject. Section 256, moreover, does not prohibit cross-examination before a charge is framed; it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved

PAGE

Witness—*continued.*

his cross-examination, to exercise his right at that time subject to a discretion given to the Magistrate by section 257. Where depositions of witnesses for the prosecution before the Magistrate previous to commitment were taken without any cross-examination by the accused being allowed, it was held that such depositions were improperly treated as evidence in the Sessions Court, as they had not been "duly taken" in the presence of the accused within the meaning of section 288 of the Code. QUEEN-EMPRESS *v.* SAGAL SAMBA SAJAO 642

Witness, Compulsion to answer questions. *See* EVIDENCE ... 392

——**Person competent to be.** *See* TRANSFER OF CRIMINAL CASE ... 920

——**Evidence of, duty of Appellate Court as to.** *See* WILL 279

——**Issue of Summons to.** *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 29

Workmanship of Goods or Commodities. *See* INSOLVENT ACT, s. 60 ...1018

Wrongful confinement of coolies employed in Tea Garden. *See* COMPOUNDING OFFENCE 103

Wrongful possession, Rights of true owner against person in. *See* RIOTING. 392

Wrongful restraint. *See* COMPOUNDING OFFENCE 103

JUDGES OF THE HIGH COURT.

Chief Justice:

HON'BLE SIR W. COMER PETHERAM, KT.

Puisne Judges:

HON'BLE H. T. PRINSEP.
" L. R. TOTTENHAM.
" J. F. NORRIS.
" J. Q. PIGOT.
" J. O'KINEALY.
" W. MACPHERSON.
" E. J. TREVELYAN.
" C. M. GHOSE.
" H. BEVERLEY.
" G. D. BANERJI.
" AMEER ALI, C.I.E.
" C. H. HILL.
" R. F. RAMPINI.
" S. G. SALE (*Offg.*)
" H. W. GORDON (*Offg.*)

HON'BLE SIR CHARLES PAUL, K.C.I.E., *Advocate-General.*
HON'BLE J. T. WOODROFFE, *Officiating Advocate-General.*
MR. A. PHILLIPS, *Standing Counsel.*
MR. L. P. PUGH, *Officiating Standing Counsel.*

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN VOLUME XXI.

PRIVY COUNCIL.

PAGE

bdul Razak v. Aga Mahomed Jaffer Bindanim 666
bdul Wahid Khan v. Shaluka Bibi ... 496
akhina Mohan Roy v. Saroda Mohan Roy 142
elhi and London Bank v. Oldham ... 60
anga Pershad Sahu v. The Land Mortgage Bank 366
hasiti v. Umrao Jan 149
obind Lal Roy v. Ramjanam Misser ... 70
ari Nath Chatterjee v. Mothurmohun Goswami 8
mambandi Begum v. Kamleswari Pershad 1005
Kader Moideen v. Nepean 882
Kishore Bun Mohunt v. Dwarka Nath Adhikari 784
Lukhi Narain Jagadeb v. Jodu Nath Deo ... 504
Mahomed Riasat Ali v. Hasin Banu ... 157
Mukund Ram Sukal v Saliq Ram Sukal ... 590
Romesh Chunder Mukerji v. Rajani Kant Mukerji 1
Suleman Kadr v. Mehdi Begum Surreya Bahu 135
Tasadduk Rasul Khan v. Ahmad Husain ... 66
Umrao Begum v. Irshad Husain ... 997

FULL BENCH REFERENCE.

rish Chundra Basu v. Apurba Krishna Dass 940
outhani Kaiburto v Bhola Kaiburto ... 213
uchiram Barik v. Ishan Chunder Chuckerbutti 568
Secretary of State for India in Council v Nitye Singh... 38
Surjan Raot v. Bhikari Raot 213

ORIGINAL CIVIL.

Administrator-General of Bengal v. Prem Lal Mullick 732
Bidhatree Dassee v. Mutty Lall Ghose ... 832
Clark v. Alexander 200
Corporation of Calcutta v. Jalu Lal Mullick 528
Gopal Chandra Ghose v. Upendra Mohan Ghose 484
Haliburton v. The Administrator-General of Bengal 488
Hossain Ali Mirza v. Abid Ali Mirza ... 177
Kanye Lall Das v. Shama Churn Dawn ... 556
Khetterpal Sritirutno v. Khelal Kristo Bhuttacharjee 904
Mahommed Zohurudden v. Mahommed Noorooddeen 85
Minatoonnessa Bibee v. Khatoonnessa Bibee 479
Narayani Dasi v. Administrator-General of Bengal 683

ORIGINAL CIVIL—continued.

PAGE

Premchand Moonshee, In the goods of 484, 832
Prossonnomoyi Dassi *v.* Sreenath Roy ... 809
Ram Kanye Audhicary *v.* Cally Churn Dey 840
Russick Lal Pal *v.* Romanath Sen ... 792
Sewnarain Mohata, In the goods of ... 911
Sreenath Roy *v.* Mudoosoodun Dutt ... 809
Srish Chunder Sing, In the matter of ... 206
Thompson *v.* Calcutta Tramways Company 523
Yamin-ud-Dowlah *v.* Ahmed Ali Khan ... 561

APPELLATE CIVIL.

Abdul Lotif *v.* Yousuff Ali 255
Abdul Mazumdar *v.* Mahomed Gazi Chowdhry 605
Ajudhia Pershad *v.* Baldeo Singh ... 818
Amir Dulhin *v.* Baij Nath Singh ... 311
Annopurna Dasi *v.* Kallayani Dasi ... 164
Azimuddin Patwari *v.* The Secretary of State for India in Council 360
Azizan *v.* Matuk Lal Sahu 437
Baikanta Nath Mittra *v.* Aughore Nath Bose 387
Bejoy Chand Mahatab Bahadur *v.* Kristo Mohini Dasi 626
Bhagbut Lall *v.* Narku Roy 789
Bikramjit Tewari *v.* Durga Dyal Tewari ... 274
Brindabun Chunder Nundi *v.* Ram Sunder Mozumdar 375
Dakhyani Debea *v.* Dolegobind Chowdhry... 430
Dhunput Singh *v.* Paresh Nath Singh ... 180
Durga Churn Laskar *v.* Hari Churn Das ... 521
Dwarka Nath Dutt *v.* Addya Sundari Mittra 319
Faez Rahaman *v.* Ramsukh Bajpai ... 169
Gobind Pershad *v.* Rung Lal 23
Golap Chand Nowlakha *v.* Ashutosh Chatterjee 602
Gopal Chunder Mitra *v.* Ram Lal Goshain ... 554
Gopendro Chunder Mitter *v.* Mokaddam Hossein 702
Gopi Koeri *v.* Gopi Lal 799
Gopi Nath Masant *v.* Adoita Naik ... 776
Gossain Chutterbhooj Dutt *v.* Ishri Mul ... 844
Hara Coomar Sircar *v.* Doorgamoni Dasi ... 195
Hurri Pershad Chowdhry *v.* Nasib Singh ... 542
Hurry Ram *v.* Nursingh Lal 129
Irshad Ali Chowdhry *v.* Kanta Pershad Hazaree 935
Jadub Lall Shaw Chowdhry *v.* Madhub Lall Shaw Chowdhry 34
Jagannath Churn *v.* Akali Dassia ... 463
Jiban Das Oswal *v.* Durga Pershad Adhikari 252
Jugul Kissore Lal Sing Deo *v.* Kartic Chunder Chattopadhya 116
Kalu *v.* Latu 259
Kamini Kant Roy *v.* Ram Nath Chuckerbutty 265
Khettramoni Dasi *v.* Shyama Churn Kundu 539
Lalla Tirhini Sahai *v.* Lalla Hurruk Narain 26
Lep Singh Khasia *v.* Nimar Khasia ... 244
Mahomed Azhar *v.* Raj Chunder Roy ... 354
Mahomed Golab *v.* Mahomed Sulliman ... 612
Mohabir Prosad Singh *v.* Adhikari Kunwar 473
Mohesh Chunder Ghose *v.* Saroda Prosad Singh 433
Mohun Pershad Narain Singh *v.* Kishen Kishore Narain Singh 344
Mokunda Bullav Kar *v.* Bhogaban Chunder Das 514
Nil Madhub Sarkar *v.* Brojo Nath Singha ... 236
Nobin Chand Nuskar *v.* Bansenath Paramanick 722
Pandit Sardar *v.* Meajan Mirdha ... 378
Pulin Chandra Roy *v.* Akbar Hossein ... 350
Radha Madhub Santra *v.* Lukhi Narain Roy Chowdhry 428
Raja Singh *v.* Kooldip Singh 989
Rajeshwar Pershad Singh *v.* Burta Koer ... 807
Rameswar Mahton *v.* Dilu Mahton ... 550
Rattan Koer *v.* Chotay Narain Singh ... 476
Roghu Singh *v.* Misri Singh 825
Rohni Singh *v.* Hodding 340
Sahdeo Pandey *v.* Ghasiram Gyawal ... 19
Satyendra Nath Thakur *v.* Nilkantha Singha 383
Sham Charan Mal *v.* Chowdhry Debya Singh Pahraj 879
Shital Mondal *v.* Prossonamoyi Debya ... 980
Sitanath Panda *v.* Pelaram Tripati ... 869
Stalkartt *v.* Guru Das Kundu Chowdhry ... 68
Subha Bibi *v* Hara Lal Das 51
Suresh Chunder Maitra *v.* Kristo Rangini Dasi 249
Taqui Jan *v.* Obaidulla 866
Tincouri Debya *v.* Shib Chandra Pal Chowdhury 639
Udai Chunder Chuckerbutty *v.* Ashutosh Das Mozoomdar 19
Watson *v.* Sreekisto Bhumick 13
Woomesh Chunder Biswas *v.* Rasmohini Dassi 27

ORIGINAL CRIMINAL.

PAGE

Queen-Empress v. Sukoe Raur 97

APPELLATE CRIMINAL.

Ishan Chandra Chandra v. Queen-Empress . 328
Moher Sheikh v. Queen-Empress ... 392
Murray v. Queen-Empress 103
Wafadar Khan v. Queen-Empress ... 955

CRIMINAL REFERENCE.

Mahmudi Sheikh v. Aji Sh ikh... ... 622
Queen-Empress v. Sagal Samba Sajao ... 642
Queen-Empress on the prosecution of Thomson v. Gunning 782
Ramjeevan Koormi v. Durga Charan Sadhu Khan 979

CRIMINAL REVISION.

Basiruddi v. Queen-Empress 827
Basumoti Adhikarini v. Budram Kolita ... 588
Bathoo Lal v. Domi Lal 727
Bechu Sheikh v. Deb Kumari Dasi ... 404
Behary Lall Trigunait v. Darby ... 915
Beni Madhub Nag v. Mati Lall Dass ... 837
Bhojal Sonar v. Nirban Singh 609
Damo Senapati v. Sridhar Rajwar ... 121
Ganga Charan Singh v. Queen-Empress ... 337
Griffiths v. Tezia Dosadh 262
Hari Kishore Mitra v. Abdul Baki Miah ... 920
Newaz Ali v. Ram Ballabh Chakravati 916 *note*
Ram Brahma Sircar v. Chandra Kanta Shah 931
Ram Chand Chatterjee v. Hanif Sheikh ... 401
Ram Chandra Das v. Monohur Roy ... 29
Rash Behari Das v. Balgopal Singh ... 92

CIVIL RULE.

Hewetson v. Deas 526

SMALL CAUSE COURT REFERENCE.

Ramdeo v. Cassim Mamoojee 173
Ramdeo v. Pokhiram 419
Sital Hari Banerjee v. Heera Lal Chatterjee 269

REFERENCE UNDER STAMP ACT.

In the matter of Ko Shway Aung v. Strang Steel and Co. 241

TESTAMENTARY JURISDICTION.

Kamineymony Bewah, In the goods of 697

INSOLVENCY.

De Momet, In the matter of 634, 1018

TABLE OF CASES CITED.

A.

PAGE

Abdul Rahiman *v.* Khaja Khaki Aruth, I. L. R., 11 Bom.. 6 ... 443
Abirunnissa Khatoon *v.* Komurunnissa Khatoon, I. L. R., 13 Calc., 100 541
Adhirani Narain Kumari *v.* Raghu Mohapatro, I. L. R., 12 Calc., 50 ... ... 429, 517
Adu Shikdar *v.* Queen-Empress, I. L. R., 11 Calc, 635 645
Advocate General of Bombay *v.* Haim Devaker, I. L. R., 11 Bom, 185 470
Ambler *v.* Pushong, I. L. R, 11 Calc., 365 408
Amir Ali *v.* Indurjeet Singh, 9 B. L. R., 460 ; 14 Moo. I. A., 203 ... 478
Amir Hassan Khan *v.* Sheo Baksh Singh, I. L. R., 11 Calc., 6 ; L. R., 11 I. A., 237 802
Amirtolal Bose *v.* Rajonee Kant Mitter, 15 B. L. R., 10 ; L. R., 2 I. A., 113... 17
Amritrav Krishna Deshpande *v.* Balkrishna Ganesh Amrapurkar, I. L R, 11 Bom., 488 803
Anandrav Bhikaji Phadke *v.* Shankar Daji Charya, I. L. R., 7 Bom., 323... 369
Annamalai *v.* Rangasami, I. L. R., 6 Mad., 365 389
Annondo Moyee Debee *v.* Luchman Pershad Gogo, 2 C. L. R., 264... 408
Anonymous Case, 5 Mad, 5 610
Anund Chander Ghose *v.* Soorjee Money Dassee, Moatrion's Morton, 231... 745
Anund Chunder Roy *v.* Nitai Bhoomij. I. L. R., 16 Calc, 429 ... 943
Anundo Lall Dass *v.* Boycaunt Ram Roy, I. L. R, 5 Calc., 283 ... 531
Ardaseer Cursetjee *v.* Perozeboye, 6 Moo., I. A, 348 745
Armstrong *v.* Clavering, 27 Beav, 226 689
Arrowsmith, *Ex parte*, L. R., 8 Ch. D, 96 749
Arunachellam *v.* Arunachellam, I. L. R., 12 Mad., 19 ; L. R., 15 I. A., 171 ... ... 67, 801
Asgur Mahomed *v.* Nuzeema Bibee, 14 W. R., 272 499
Asighar Reza, In the matter of the petition of, I. L. R., 16 Calc., 287 525
Ashruff-ood-dowla Ahmed Hossein *v.* Hyder Hosein Khan, 11 Moo. I. A., 94 671
Asloo *v.* Umdutoonissa, 20 W. R., 297 999
Asmutullah Dalal *v.* Kally Churn Mitter, I. L. R., 7 Calc., 56 ... 546
Attimoollah *v.* Seheboollah, 15 W. R., 149 235
Aubhoy Churn Maji *v.* Shoshi Bhusan Bose, I. L. R., 16 Calc., 155 ... 725

PAGE

Avards v. Rhodes, 8 Exch, 312 ; 22 L. J., Exch., 106 421
Azizan v. Matuk Lal Sahu, I. L. R., 21 Calc., 437 944
Azizuddin Hussein v. Ramanugra Roy, I. L. R., 14 Calc., 605 ... 990

B.

Bachha Jha v. Jugmon Jha, I. L. R., 12 Calc., 348 345
Baker, *In re*, L. R., 44 Ch. D., 262 835
Baidya Nath Singh v. Muspratt, I. L. R., 14 Calc., 141 95
Baijnath Sahu v Lala Sital Prasad, 2 B. L R., F. B., 1 ; 10 W. R., F. B., 66 76
Baij Nath Tewari v. Sheo Sahoy Bhagut, I. L. R., 18 Calc , 556 ... 875
Bairagula v. Bapanna, I L. R., 15 Mad., 302 442
Bala Subbana, In the matter of the petition of, Weir's, Rep., 1009 ... 94
Balkrishna Bhalchandra v. Gopal Raghunath, I. L. R., 1 Bom., 73 ... 843
Bal Mokoond Lal v. Jirjudhun Roy, I. L. R., 9 Calc., 271 77, 362, 365
Balavantrav Oze v. Sadrudin, I. L. R., 13 Bom., 485 996
Bama Sunderi Debi v. Tara Sunderi Debi, I. L. R., 19 Calc., 65 ; L. R , 18 I. A., 132 3
Barnes v. Wood, L. R., 8 Eq., 424 1012
Barry v. Butlin, 2 Moo., P. C., 482 290
Batak Nath v. Pitambar Das, I. L. R., 13 All., 360 28
Bebee Muttra, In the goods of, Montriou's Morton, 191 740
Beer Chunder Jeobraj v. Tarinee Churn Roy, 11 W. R., 46 ... 429
Beni Madhab Mitter v. Khatir Mondul, I. L. R , 14 Calc., 449 ... 875
Beresford Hope v. Lady Sandhurst, L. R., 23 Q B. D., 79 ... 748
Bhagabat Prasad Sing v. Durg Bijai Sing, 8 B. L. R., 73 ; 16 W. R., 95 235
Bhagu Jetha v. Malek Bawasaheb, I. L. R., 9 Bom., 318... ... 389
Bhala Nahana v. Parbhu Hari, I. L. R., 2 Bom , 67 191
Bhashyam v. Jayaram, I. L. R., 11 Mad., 303 803
Bhau Babaji v. Gopala Mahipati, I. L. R., 11 Bom., 325 191
Bhola v. Gobind Dayal, I. L. R., 6 All., 186 218
Bhugwan Das Bogla v. Bunko Behary Bajpie, Suit No. 130 of 1884, unreported 205
Bhupendro Narayan Dutt v. Nemye Chand Mondul, I. L. R., 15 Calc., 627 604
Bidhu Mukhi Dabi v. Bhugwan Chunder Roy Chowdhry, I. L. R., 19 Calc . 643 ... ... 41, 379
Bijadhur Bhugut v Monohur Bhugut, I L. R , 10 Calc., 11 218
Binda Kuar v Bhonda Das, I. L. R , 7 All.. 660 116
Bindessuri Pershad Singh v. Jankee Pershad Singh, I. L. R., 16 Calc , 482 218
Bir Narain Panda v. Darpa Narain Prodhan, I. L. R., 20 Calc., 74 ... 548
Bisheswar Shaha v. Bishwambhur Sircar, 23 W. R. Cr., 64 ... 985
Blackwell, *In re*, 9 Bom. H. C , 461 636
Bowden v. Laing, 14 Sim, 113 689
Brewer v. Yorke, L. R., 20 Ch. D., 669 565
Brindaban Chunder Roy v. Serampore Municipal Commissioners, 19 W R., 309 323
Broad v. Bevan, 1 Russ., 511, note 688
Brojendra Nath Dass v. The Budge-Budge Jute Mills, I. L. R , 20 Calc.. 527 421
Buhuns Koonwur v. Lalla Buhoree Lall, 10 B. L. R., 159., 14 Moo. I. A , 496 378
Bunwari Lall Sahu v. Mohabir Persad Singh, 12 B. L. R , 297 ; L. R. 1 I. A., 89 ... ... 76, 355

PAGE

Burgess, *Ex parte*, 2 Gl. and J., 183 1019
Bussun Lall Shookul *v.* Chundee Dass, I. L. R.. 4 Calc., 686 ... 238
Bykant Nath Shaha *v.* Rajendra Narain Roy, I. L. R., 12 Calc., 333... 204
Bykuntnath Roy Chowdhry *v.* Pogose, 5 W. R., 2 874

C.

Callan's Case, 1 Leg. Rem. Punj. Cir. Orders, 21st May 1869 ... 646
Campbell *v.* Brownrigg, 1 Phill., 301 491
Carew *v.* Johnston, 2 Sch. and Lef., 308 615
Carr *v.* Living, 28 Beav., 644 ... ... 688, 689
Castle *v.* Wilkinson, L. R., 15 Ch., 534, 536 1012
Chandra Bhagubai *v.* Kashinath, 2 Bom., 341 689
Chandra Kamal Das *v.* Bissesurree Dassia, 13 C. L. R., 243 ... 546
Chandra Nath Biswas *v.* Biswa Nath Biswas, 6 B. L R., 492 ... 481
Chandra Prodhan *v* Gopi Mohan Shaha, I. L. R., 14 Calc., 385 ... 388
Chatraput Singh *v.* Grindra Chunder Roy, I. L. R , 6 Calc., 389 ... 386
Chenibash Shaha *v.* Sridam Mandal, I. L. R , 5 Calc., 97 ... 547
Chimnaji Gobind Godbole *v.* Dinkar Dhondev Godbole, I. L. R., 11 Bom., 320 192
Chintaman Damodar Agashe *v.* Balshastri, I. L. R., 16 Bom., 294 ... 389
Chintamanrav Natu *v.* Vithabai, I. L. R., 11 Bom., 588 558
Chorlton *v.* Lings, L. R. 4 C. P., 374 748
Chowdhry Khan *v.* Gour Jana., 2 W. R. Act X. Rul. 40 ... 130
Chowdhry Murtaza Hossein *v.* Bechunnissa, L. R., 3 I. A., 209 ; 26 W. R., 10 ... ... 217, 218
Chowdhry Paroosh Ram Das *v.* Kali Puddo Banerjee, I. L. R., 17 Calc., 53 24
Clark *v.* Henry, L. R., 6 Ch. D., 588 690
Cleare *v.* Cleare, L. R., 1 P. and D., 657 291
Codd *v.* Cobe. L. R., 1 Ex. D., 352 339
Coggan *v.* Allen, L. R , 23 Ch. D., 101 690
Coote *v.* Whittington, L. R , 16 Eq., 534 317
Crawshay *v.* Collins, 1 Swanst., 495 1019
Cutler *v.* Turner, L. R., 9 Q. B., 502 264

D.

Dagdusa Tilakchand *v.* Bhukan Govind Shet, I. L. R., 9 Bom., 82 ... 805
Dakhina Mohun Roy *v.* Saroda Mohun Roy, I. L. R., 21 Calc., 142 ; L. R , 20 I. A., 160 500
Dandekar *v.* Dandekars, I. L. R., 6 Bom., 663 ... ... 215, 593
Darnell *v.* Corfield, 1 Rob. Eccl., 63 295
Dawkins *v.* Antrobus, L. R., 17 Ch. D., 615 470
Debendro Kumar Bandopadhya *v.* Bhupendro Narayan Dutt, I. L. R., 19 Calc , 182 ... ... 41, 604
Debendro Nath Mullick *v.* Odit Churn Mullick, I. L. R., 3 Calc., 390 469
Debi Churn Biswas, In the matter of the petition of, 20 W. R. Cr., 40 935
Deb Narain Dutt *v.* Narendra Krishna, I. L. R., 16 Calc., 267 ... 942
De Geer *v.* Stone, L. R., 22 Ch. D., 243 744
Degumbari Dabi *v.* Ashootosh Banerjee, I. L. R., 17 Calc., 610 ... 837
Delhi and London Bank *v.* Orchard, I. L. R., 3 Calc., 47... ... 835
Dena Gazee *v.* Mohinee Mohun Doss, 21 W. R., 157 988
Dewan Elahi Newaz Khan *v.* Suburnnissa, 5 W. R., Cr., 14 ... 412
Devendra Nath Sanyal *v.* Chandra Kishore Munshi, I. L. R., 12 Calc., 436 38
Dhan Bhagut *v.* Rameswar Dutt Singh, 20 W. R., 53 272

PAGE

Dhan Mundul, *In re*, 6 C. L. R., 53 ... ... 646, 649
Dhunput Singh, *In re*, L. R., 20 Calc., 771 744
Dhuronidhur Sen *v.* Agra Bank, I. L R., 4 Calc., 380 461
Dirgopal Lall *v.* Bolakee, I. L. R., 5 Calc.. 269 120
Doe d. Seebkristo *v.* East India Company, 6 Moo. I. A., 267 ... 478
Domun *v.* Emaum Ally, I. L. R , 7 Calc., 401 91
Dowlath Bee *v.* Shaik Ali, 5 Mad H. C., 473 98
"Dowse," The, L. R., 3 A. and E., 135 748
Doyal Chunder Ghose *v.* Dwarka Nath Misser, Marsh, 148 ... 517
Doyal Mistree *v.* Kupoor Chund, I. L. R., 4 Calc., 318 ... 271, 272
Dumoodhur Dass, In the goods of, Bourke, Pt. V., 6 749
Dungannon *v.* Smith, 12 Cl. and Fin., 546 494
Durga Chowdhrani *v.* Jewahir Singh Chowdhri, I. L. R., 18 Calc., 23 ; L. R., 17 I. A., 122 508
Durham (Earl of) *v.* Legard, 34 Beav., 611 1009
Dutto Singh *v.* Dosad Bahadur Singh, I. L. R., 9 Calc., 575 ... 215
Dwarkaram Misser *v.* Jogessur Lall, 21 W. R., 276 262
Dyamoyee Dayee *v.* Modhoo Soodun Mytee, 3 W. R., 147 ... 262
Dyebukee Nundun Sen *v.* Mudhoo Mutty Gupta, I. L. R., 1 Calc., 123 ; 24 W. R., 478 251
Dyson *v.* Phillips, 10 H. L. C., 624 690

E.

Earl of Durham *v.* Legard, 34 Beav., 611 1009
Empress *v.* Asghar Ali, I. L. R., 6 All., 61 983
Empress *v.* Dhunno Kazi, I. L R., 8 Calc., 121 653
Empress *v.* Donnelly, I. L. R., 2 Calc., 405 930
Empress *v.* Engadu, I. L. R., 11 Mad., 98 650
Empress *v* Ganraj, I. L. R., 2 All., 444 645
Empress *v.* Haran Chunder Mitter, 6 C. L. R., 390 645
Empress *v.* Malhari, I. L. R., 6 Bom., 731 331
Empress *v.* Munshi Sheikh, I. L. R., 8 Calc., 616 649
Empress *v.* Shasti Churn Napit, I. L. R., 8 Calc., 331 339
Empress *v.* Vaimbilee, I. L. R., 5 Calc., 826 644
Empress *v.* Viraperumal, I. L. R., 16 Mad., 105 650
Eshan Chunder Safooi *v.* Nundamoni Dassee, I. L. R., 10 Calc., 357... 608
Everard *v.* Kendall, L R., 5 C. P., 428 748

F.

Fakir Chand Bose *v* Madan Mohun Ghose, 4 B. L. R., F. B., 130 ... 549
Fane *v.* Fane, L. R., 13 Ch. D., 228 690
Fekoo Mahto *v.* Empress, I. L. R., 14 Calc., 539 644
Finlay Muir and Company *v.* Gopee Kristo Gossamee, 24 W. R., 404 234
Flower *v.* Lloyd, L. R.,10 Ch. D., 227 615
Framji Bomanji *v.* Hormasji Barjorji, 3 Bom. H. C., O. C., 49 ... 943

G.

Gajapathi Radhika *v.* Gajapathi Nilamani, 13 Moo., I. A., 509 ; 6 B. L. R., 202 592
Ganouri Lal Dass *v* Queen-Empress, I. L. R., 16 Calc., 206 ... 394
Gardiner, *Ex parte*, 1 Rose., 377 1019
Geereeballa Dabee *v.* Chunder Kant Mookerjee, I. L. R., 11 Calc., 213 181

PAGE

Gobind Chandra Gangapadhya *v.* Sherajunessa Bibi, 13 C. L. R., 1 356, 859
Gobind Lal Roy *v.* Biprodas Roy, I. L. R., 17 Calc., 398 ... ... 72, 355
Gobind Lal Roy *v.* Ramjanam Misser, I. L. R., 21 Calc., 70 ; L. R., 20 I. A., 165 853
Gobind Monee Debia *v.* Denobundhoo Shaha, 15 W. R., 87 ... 235
Gobind Prasad *v.* Chandar Sekhar, I. L R., 8 All., 486 276
Godha *v.* Naik Ram, I. L. R., 7 All., 152 433
Gokal Das Gopaldas *v.* Rambuksh Seochand, I. L. R., 10 Calc., 1035 ; L. R., 11 I. A., 26 369
Gokhul Sahu *v.* Jodu Nundun Roy, I. L. R., 17 Calc., 721 39, 58, 380
Gokibai *v.* Lakhmidas Khimji, I. L. R., 14 Bom., 490 689
Golam Abas *v.* Mahomed Jaffer, I. L. R., 19 Calc , 23, note ... 276
Gopal Chunder Chuckerbutty *v.* Oodoy Lall Dey, 10 W. R., 115 ... 146
Gopal Gurain *v.* Gurain, 7 W. R., 299 470
Gopal Lal Seal's Case, Unreported 747
Gopee Nath Acharji *v.* Achcha Bibee, I. L. R., 7 Calc., 553 ... 201
Gopi Mohun Roy *v* Doybaki Nundon Sen, I. L. R., 19 Calc., 13 ... 641
Gossain Money Puree *v.* Guru Pershad Singh, I. L. R., 11 Calc., 146 563
Government of Bengal *v.* Heera Lall Dass, 17 W. R., Cr., 39 ... 407
Govindrav *v.* Ravji, I. L. R., 12 Bom., 33 570
Greender Chunder Ghose *v.* Mackintosh, I. L. R., 4 Calc., 897 ... 689
Grish Chandra *v.* Kashisauri Debi, I. L. R., 13 Calc., 145 571, 795, 797
Gudri Koer *v.* Bhoobaneswari Coomar Singh, I. L. R., 19 Calc., 19 ... 276
Gunamani Dasi *v.* Pran Kishori Dasi, 5 B. L. R., 223 ; 13 W. R., F. B., 69. 439
Guni Khan *v.* Kunjo Behary Sein, 3 C. L. R., 414 440
Gur Buksh Lall *v* Jawahir Singh, I. L. R., 20 Calc , 599 ... 804

H.

Hafez Mahomed Ali Khan *v.* Damodar Pramanick, I. L. R., 18 Calc., 242 813
Hakimunnissa *v.* Deonarain, I. L. R., 13 All., 102 ... 573, 575, 797
Hamida *v.* Bhudhun, 20 W. R., 238 993
Hari Dass Sanyal *v.* Saritulla, I. L. R., 15 Calc., 608 935
Hall *v.* Robertson. 4 De Gex M. and G., 781 688
Hamill *v.* Lilley, L. R., 19 Q. B. D., 83 564
Hankin *v.* Turner, L. R., 10 Ch. D., 372 527
Haradhone Dass *v.* Ramdoyal Rai, I. L. R., 21 Calc., 181 (note) ... 181
Harihar Mukhopadhya *v.* Madub Chundra, 8 B. L. R., 566 ; 14 Moo , I. A., 152 ... ... 41, 59
Harlock *v.* Ashberry, L. R., 19 Ch. D., 84 527
Harwood *v.* Baker, 3 Moo., P. C., 282 291
Hastilow *v.* Stobie, L. R., 1 P. and D., 64 291
Hawkins *v.* Gathercole, 6 De. G , M. and G., 20 738
Heane *v.* Rogers, 9 B. and C., 577 1019
Hidayut-oolah *v.* Rai Jan Khanum, 3 Moo. I. A., 295 670
Hill *v.* Buckley, 17 Vesey, 394 1012
Hira Lal *v.* Bhairon, I. L. R , 5 All., 602 181
Hira Lal Das *v.* Mothura Mohun Roy, I. L. R., 15 Calc., 714 ... 134
Holme *v.* Guy, L. R., 5 Ch. D., 905 771
Hooper *v.* Smart, L. R., 18 Eq., 683 1012
Hopkinson *v* Marquis of Exeter, I. L. R., 5 Eq., 63 470
Hossein Ali, In the goods of, Fulton, 339 ... ... 740, 744
Hossein Buksh *v.* Empress, I. L. R. 6 Calc , 96 ; 6 C. L. R., 521 ... 407
Houghton *v.* Brown, 53 L. J. Ch. (N.S.) 1018 494
Hubbard *v.* Goodley, L. R., 25 Q. B. D., 156 422

PAGE

Hulme *v.* Hulme, 9 Sim., 644 491
Hurendro Narain Singh Chowdry *v.* Bhobani Prea Baruani, I. L. R., 11 Calc., 762 33
Hurro Chunder Roy Chowdhry *v.* Sooradhoonee Dabea, B. L. R. Sup. Vol. 985; 9 W. R., 402 992
Hurronath Chowdhry *v.* Nistarini Chowdhrani, I. L. R., 10 Calc., 74 214
Hurry Behari Bhagat *v.* Pargun Ahir, I. L. R., 19 Calc., 656 ... 238
Hurry Charan Bose *v.* Subaydar Sheikh, I. L. R., 12 Calc., 161 ... 389
Hurry Dass Neogy, In the goods of, Unreported 747
Husaini Begum *v.* Mulo, I. L. R., 5 All., 84 875

I.

Ichamoyee Chowdhranee *v.* Prosonno Nath Chowdhri, I. L. R., 9 Calc., 557 215
Ilata Shivatri *v.* Ilata Narayanna Nambudri, 1 Mad., 372 ... 689
Imambandi Begum *v.* Kamleswari Pershad, I. L. R., 14 Calc., 109; L. R., 13 I. A., 160 1007
Imamunnissa Bibi *v.* Liakat Husain, I. L. R., 3 All., 424 ... 22
Ina Sheikh *v.* Queen-Empress, I. L. R., 11 Calc., 160 331
Ingham *v.* Bickerdike, 6 Madd., 275 209
Ishan Chunder Bandopadhya *v.* Indro Narain Gossami, I. L. R., 9 Calc., 788 440
Ishan Chunder Chowdhry *v.* Chunder Kant Roy, 13 C. L. R., 55 ... 386
Ishan Muchi *v.* Queen-Empress, I. L. R., 15 Calc., 511 331
Ishri Singh *v.* Baldeo Singh, I. L. R., 10 Calc., 792 999
Issen Chunder Kur *v.* Madhub Chunder Ghose, 1 Rev Jud., and Police Journal, 1863, p. 109 709
Ivory, *In re*, L. R., 10 Ch. D., 372 527

J.

Jafri Begum *v.* Amir Mahomed Khan, I. L. R., 7 All., 822 ... 316
Jagadamba Chaodhrani *v.* Dakhina Mohan, I. L. R., 13 Calc., 308 L. R., 13 I. A., 84 144
Jagannath Gorai *v.* Watson, I. L. R., 19 Calc., 341 607
Jai Narayan Rai *v.* Queen-Empress, I. L. R., 17 Calc., 862 ... 644
Jan Ali *v.* Ram Nath Mundul, I. L. R., 8 Calc., 32 180
Jani Begam *v.* Jahangir Khan, I. L. R., 9 All., 476 ... ... 595, 797
Janki Kunwar *v.* Ajit Singh, I. L. R., 15 Calc., 58; L. R., 14 I. A., 148 500
Javherbai *v.* Haribhai, I. L. R., 5 Bom., 575 558
Jaykali Debi *v.* Shibnath Chatterjee, 2 B. L. R., O. C., 1 ... 740, 765
Jefferys *v.* Boosey, 4 H. L. C., 815 914
Jeo Lall Sing *v.* Surfun, 11 C. L. R., 483 238
Jitbahan *v.* Bansrup Dhobi, 6 C. L. R., 193 415
Jivaji *v.* Ram Chandra, I. L. R., 16 Bom., 123 388
Jivraji *v.* Pragji, I. L. R., 10 Mad., 51 261
Jewan Ali Beg *v.* Basu Mal, I. L. R., 8 All., 203 527
Jones *v.* Ledgard, I. L. R., 8 All., 340 215
Joshi Kalidas Sevakram *v.* Dakor Town Municipality, I. L. R., 7 Bom., 399 322
Joslin *v.* Hammond, 3 My. & K., 110 494
Juala Prasad *v.* Khuman Singh, I. L. R., 2 All., 617 276
Jubber *v.* Jubber, 9 Sim., 503 688
Judhistir Patro *v.* Nobin Chandra Khela, I. L. R., 13 Calc., 73 ... 544
Jugobundhu Pattuck *v.* Jadu Ghose Alkushi, I. L. R., 15 Calc., 47 803

PAGE

Jugul Kishore v. Jotendro Mohun Tagore, I. L. R., 10 Calc., 985; L. R., 11 I. A., 66 15
Julius v. Bishop of Oxford, L. R., 5 App. Cas., 214 835
Justices of the Peace for Calcutta v. The Oriental Gas Company, 8 B. L. R., 433... 474

K.

Kahn v. Alli Mahomed Haji Umer, I. L. R., 16 Bom., 577 ... 91
Kala Chand Sircar v. Queen-Empress, I. L. R., 13 Calc., 53 ... 646
Kalianasundram v. Egnavedeswara, I. L. R., 11 Mad., 261 ... 996
Kally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry, I. L. R., 8 Calc., 378 688
Kamruddin Dai v. Sonatun Mandal, I. L. R., 11 Calc., 449 ... 93
Kanizak Sukina v. Monohur Das, I. L. R., 12 Calc., 204 ... 520, 521
Karman Bibi v. Misri Lal, I. L. R., 2 All., 904 541
Kasi Kishor Roy v. Tarini Kant Lahiri, 3 B. L. R., A. Cr., 76 ... 412
Kasimunnissa Bibee v. Nilratna Bose, I. L. R., 8 Calc., 79 ... 120
Kattama Nauchear v. Rajah of Shivagunga, 9 Moo. I. A., 539 ... 9, 1000
Kewal Ram v. Khadim Husain, I. L. R., 5 All., 576 26
Khajoorooonissa v. Roushan Jehan, I. L. R., 2 Calc., 184; L. R., 3, I. A., 291 671
Kherodemoney Dassee v. Doorgamoney Dassee, I. L. R., 4 Calc., 455 772
Khodabux v. Budree Narain Singh, I. L. R., 7 Calc., 137 ... 629
Khoda Bux v. Degumburee Dossee, W. R., 1864, 207 172
Khoshdeb Biswas v. Satar Mondol, I. L. R., 15 Calc., 436 571, 575, 795, 797
Khyrat Ali v. Syfullah Khan, 8. W. R., 130 520
Kilvington v. Grey, 10 Sim., 293 688
King, The v. Long, 1 M. & Ry., 139 323
King, The v. Warwickshall, 1 Leach, 263, 298 645
Kishore Mohan Roy, In the matter of the petition of, 19 W. R., Cr., 10 412
Kishory Mohun Roy v. Mahomed Muzaffar Hossein, I. L. R., 18 Calc., 188 641
Kokil Singh v. Duli Chund, 5 C. L. R., 243 120
Kondappa v. Subba I. L. R., 13 Mad., 189 191
Kota Seetamma v. Kollipurla Soobbiah, 8 Mad. H. C., 81 ... 228
Krishnashankar v. Chandrashankar, I. L. R., 5 Bom., 198 ... 201
Kumnund Narain Bhoop, In the matter of the petition of, I. L. R., 4 Calc., 650 408

L.

Lachmeswar Singh v. Manowar Hossein, I. L. R., 19 Calc., 253: L. R., 19 I. A., 48 344
Lakshmana v. Najimudin, I. L. R., 9 Mad., 145 804
Lala Gauri Sanker Lal v. Janki Pershad, I. L. R., 17 Calc., 809; L. R., 17 I. A., 57 ... ... 78, 859
Lala Jugdeo Sahai v. Brij Behari Lal, I. L. R., 12 Calc., 505 ... 571
Lala Kirat Narain v. Palukdhari Pandey, I. L. R., 17 Calc., 326 ... 781
Lala Mobaruk Lal v. Secretary of State for India, I. L. R., 11 Calc., 200 ... ... 74, 356, 362, 365
Lal Chand v. Queen-Empress, I. L. R., 18 Calc., 549 649
Lallubhai Bapabhai v. Mankurabhai, I. L. R., 2 Bom., 388 ... 746
Lal Mohun Mukerjee v. Jogendra Chunder Roy, I. L. R., 14 Calc., 636 942

PAGE

Lalraddi Mullick *v.* Kala Chand Bera, I. L. R., 15 Calc., 363 ... 24
Lamb *v.* Eames, L. R, 6 Ch, 597 688
Lane *v.* Cotton, 12 Mod., 1486 759
Lassence *v* Tierney, 1 M. and G., 551 ... ... 491, 494
Lati Kooer *v.* Sobadra Kooer, I. L. R., 3 Calc., 720 993
Lee *v.* Houlett, 2 K. and J., 531 570
Leman *v.* Damodaraya, I. L. R., 1 Mad., 158 322
Lett *v.* Randall, 10 Sim., 112 492
Leverson *v.* The Queen, L. R., 4 Q. B., 394 757
Lewis *v.* Rossiter, 44 L. J. Exch., 136 593
Loganada Mudali *v.* Ramaswami, 1 Mad., 384 749
Lokee Narain Roy Chowdhry *v.* Kallypuddo Bandopadhya, L. R., 2 I A., 154 378
Longford *v.* Purdon, Ir. R. Ch., 75 292
Lord *v.* Colvin, 3 Drew., 222 402
Lovett, *In re*, L. R, 3 Ch. D, 198 317
Lutf Ali Khan *v.* Asgur Reza, I. L. R, 17 Calc, 455 474
Lutful Huq *v.* Sumbhudin Pattuck, I. L. R., 8 Calc., 248 ... 388

M.

Macleod *v.* Attorney-General for New South Wales, L. R., 1 App. Cas, 455 914
Macnaghten *v.* Mahabir Pershad Singh, I. L. R., 9 Calc., 656; L. R. 10 I. A., 25 ... ... 69, 801
Madho Prakash Singh *v.* Murli Manohar, I. L. R., 5 All., 406 ... 429, 517
Mahamed Arif *v* Saraswati Debya, I. L. R., 18 Calc, 259 ... 874
Mahammed Azmat Ali Khan *v.* Lalli Begum, I. L R., 8 Calc., 422; L. R., 9 I. A., 8 671
Mahomed Awais *v.* Harsahai, I. L. R, 7 All., 716 316
Mahomed Bauker Hossein *v.* Shurfoonessa Begum, 8 Moo. I. A., 136 671
Mahomed Gazee Chowdhry *v.* Ram Lall Sen, I. L. R., 10 Calc., 757 559
Mahomed Shuffli *v.* Laldin Abdula, I. L. R., 3 Bom., 227 ... 177
Mahomed Shumsool Hoda *v.* Shewakram, 14 B. L. R., 226; L. R., 2 I. A., 7 689
Makin *v.* Attorney-General of New South Wales, L. R. (1894); A. C., 57 970
Maressur Dass *v.* Collector and Municipal Commissioners of Chapra, I. L. R., 1 Calc., 409 321
Manickram Chattopadhia *v.* Meer Conjeer Ali Khan, Morton, 125 ... 744
Manisha Eradi *v.* Siyali Koya, I. L. R, 11 Mad., 220 803
Mankeshwar *v.* Bhimrav Ravji, I. L. R., 1 Bom., 577 844
Massey *v.* Massey, W. N. (1873), 76 689
Mathura Das *v.* Nathuni Lall Mahta, I. L. R., 11 Calc., 731 ... 558
Mathura Naikin *v.* Esu Naikin, I. L. R., 4 Bom., 545 152
Maw *v.* Topham, 19 Beav., 576 1009
Mayer *v.* Townsend, 3 Beav., 443 491
McCullochs, *In re*, 6 Ir. Eq., 393 209
Megh Lall Pooree *v.* Shib Pershad Madi, I L. R., 7 Calc., 34 ... 67
Melgirappa *v.* Shivappa, 6 Bom., A. C., 270 191
Merlin *v.* Blagrave, 25 Beav., 125 690
Micharaya Guruvu *v.* Sadasiva Parama Guruvu, I. L. R., 4 Mad, 319 217
Mirza Qaim Ali Beg *v.* Hingun, 3 Sel. Rep., 152, 154 670
Mitchell *v.* Thomas, 6 Moo. P. C., 150 289
Mithu Lall *v* Khairati Lal, I. L. R., 12 All., 569 549
Modhoo Soodun Mullick *v.* Panch Cowrie Mullick, 7 W. R., 302 ... 429
Modun Mohun Dutt *v.* Futtarunnissa, I. L. R., 13 Calc., 297 ... 570
Moheeb Ali *v.* Ameer Rai, I. L. R., 17 Calc., 538 604

PAGE

Mohecooddeen *v.* Ahmed Hossien, 14 W. R., 384 563
Mohendro Narain Chaturaj *v.* Gopal Mondul, I. L. R., 17 Calc., 769... 448, 667
Mohini Mohan Das *v.* Satis Chandra Roy, I. L. R., 17 Calc , 704 ... 554
Mohabeer Pershad Singh *v.* Collector of Tirhoot, 15 W. R , 137 ... 76
Mon Mohan Sarkar *v.* Secretary of State for India, I. L. R., 17 Calc., 968 254
Mon Mohinee Debee *v.* Benode Beharee Shaha, 25 W. R., 10 ... 238
Mon Mohun Buksee *v.* Gunga Soondery Dabee, I. L. R., 9 Calc., 181 629
Mon Mohun Roy *v.* Durga Churn Gooee, I. L. R., 3 Calc., 502 ... 544
Mookoond Lal Pal Chowdhry *v.* Mahomed Sami Meeah, I. L. R., 14 Calc., 484 993
Moosa *v.* Essa, I. L. R., 8 Bom., 241 747
Morgan *v.* Thomas, L. R., 9 Q. B. D., 643 835
Muchiram Barik *v.* Ishan Chandra Chuckerbutti, I. L. R., 21 Calc., 568 798
Muhammad Allahdad Khan *v.* Muhammad Ismail Khan, I. L. R., 10 All., 289 671
Muhammad Ewaz *v.* Birj Lal, I. L. R., 1 All., 465 875
Muhammad Yusuf Khan *v.* Abdul Rahman Khan, I. L. R., 16 Calc., 749 ; L. R., 16 I. A., 104 802
Mukund Harshet *v.* Haridas Khemji, I. L. R., 17 Bom., 23 ... 440
Mulka Do Alam Nawab Tajdar Bohoo *v.* Jehan Kadr, 10 Moo. I. A., 252 138
Mussoorie Bank *v.* Raynor, I. L. R., 4 All., 500 ; L. R., 9 I. A., 70... 688
Muttalagiri Nayak *v.* Muttayyar, I. L. R., 6 Mad., 357 201
Mutty Jan *v.* Ahmed Ally, I. L. R., 8 Calc., 370 316
Myna Bai *v.* Uttaram, 2 Mad., 202 700

N.

Nagendra Nath Mullick *v.* Mathura Mohun Parhi, I. L. R., 18 Calc., 368 ... ...430, 516
Nagu *v.* Salu, I. L. R., 15 Bom., 424 632
Najibunnissa, In the matter of the petition of, 4 B. L. R., A. C., 55 671
Nanack Chand *v.* Teluckdye Koer, I. L. R., 5 Calc., 265 ; 4 C. L. R., 358 120
Narain Dass Bepary *v.* Soobul Bepary, 1 W. R., 113 235
Narain Mahton *v.* Manofi Pattuk, I. L. R., 17 Calc., 489 ... 725
Narasanna *v.* Gangu, I. L. R., 13 Mad., 133 701
Narayan Vithe Parab *v.* Krishnaji Sadashiv, I. L. R., 10 Bom., 233 469
Narsingh Sewak Singh *v.* Madho Das, I. L. R., 4 All., 274 ... 388
Neale *v.* Clarke, L. R., 4 Exch. D. 296 426
Newill *v.* Newill, L. R., 7 Ch., 253 493
Nichols *v.* Baker, L. R., 44 Ch. D., 262 835
Nilakanta *v.* Krishnasami, I. L. R., 13 Mad., 225 ... ... 571, 797
Nilmadhub Chuckerbutty *v.* Ramsodoy Ghose, I. L. R., 9 Calc., 857 546
Nilmadhub Karmokar *v.* Shibu Pal, 5 B. L. R., Ap. 18 ; 13 W. R., 410 704
Nilmani Burnick *v.* Puddo Lochan Chuckerbutty, B. L. R., Sup. Vol., 379 ; 5 W. R., Act X, 20 608
Nilmoni Singh Deo *v.* Taranath Mukerjee, I. L. R., 9 Calc., 295 ; L. R., 9 I. A., 174 ... ... 429, 517
Nimbaji Tulsiram *v.* Vadia Venkati, I. L. R., 16 Bom., 683 ... 201
Nityanund Ghose *v.* Mohendro Kristo Ghose, I. L. R., 21 Calc., 181 (note) 181
Nobin Chunder Bannerjee *v.* Romesh Chunder Ghose, I. L. R., 14 Calc., 781 843

PAGE

Nobin Chunder Chackerbutty v. Guru Persad Doss, B. L. R., Sup. Vol., 1008; 9 W. R., 505 13
Nobo Doorga Dossee v. Foyzbux Chowdhry, I. L. R., 1 Calc., 202 238
Norendro Nath Roy Chowdhry v. Srinath Sandal, I. L. R., 19 Calc., 641 ... ... 41, 379
Nubo Kishen Mookerjee v. Deb Nath Roy Chowdhry, 22 W. R., 194 439
Nujeeni Mullick v. Erfan Mollah, 22 W. R., 298 439
Nundo Lall Bose v. The Corporation of Calcutta, I. L. R., 11 Calc., 275 320

O.

Obhoy Chunder Bundopadhya v. Nilambur Mookerjee, W. R., 1864, 73 172
Oodit Rai v. Ram Gobind Singh, 2 Agra H. C., 206 (Dec. 1867) ... 235
Oriental Bank Corporation v. Gobind Lall Seal, I. L. R., 9 Calc., 604 180
Otto v. Lindford, L. R., 18 Ch. D., 394 563
Oudh Behari Lal v. Nageshar Lal, I. L. R., 13 All., 278 ... 823

P.

Palaniappa Chetti v. Rayappa Chetti, 4 Mad. H. C., 119 ... 228
Paras Ram v. Gardner, I. L. R., 1 All., 355 388
Patch v. Ward, L. R., 3 Ch., 203 ... ... 615, 616
Pat Dasi v. Sharup Chand Mala, I. L. R., 14 Calc., 376 440
Peary Mohun Mukerjee v. Ali Shiekh, I. L. R., 20 Calc., 249 ... 379
Penny, *In re*, 7 E. and B., 660 323
Percival v. Podley, L. R., 18 Q. B. D., 635 422
Pertab Narain Singh v. Subhao Kooer, I. L. R., 3 Calc., 626; L. R., 4 I. A., 228 1000
Pertab Narain Singh v. Trilokinath Singh, I. L. R., 11 Calc., 186; L. R., 11 I. A., 197 15
Peruvian Guano Company v. Dreyfus Brothers, L. R. (1892), A. C., 166 ... ... 148, 500
Petu Ghorai v. Ram Khelawan Lal, I. L. R., 18 Calc., 667 ... 603
Pirthiram Chowdhry, In the matter of the petition of, 20 W. R., Cr., 51 408
Pirthi Pal Singh v. Husaini Jan, I. L. R., 4 All., 361 316
Polini v. Gray, L. R., 12 Ch. D., 438 563
Poresh Nath Mojumdar v. Ramjodu Mojumdar, I. L. R., 16 Calc., 246 824
Poromanand Khasnabish v. Khepoo Paramanick, I. L. R., 10 Calc., 354 440
Port v. Turton, 2 Wils., 169 1019
Prem Chand Dey v. Mokhoda Debi, I. L. R., 17 Calc., 699 ... 641
Prosunno Kumar Sanyal v. Kalidas Sanyal, I. L. R., 19 Calc., 683; L. R., 19 I. A., 166 ... ... 442, 943
Protab Chunder Mookerjee v. Empress, 11 C. L. R., 25 650
Prudham v. Phillips, 2 Ambl., 763 614
Puddomonee Dossee v. Roy Muthooranath Chowdhry, 12 B. L. R., 411; 20 W. R., 133 356
Puran Chand v. Roy Radha Kishan, I. L. R., 19 Calc., 132 ... 553
Puran Mal v. Ali Khan, I. L. R., 1 All., 285 521
Purshotam Dass v. Mahanant Surajbharthi, I. L. R., 6 Bom., 588 ... 815
Pyari Lall, In the case of, 4 C. L. R., 504 970

PAGE

Q.

Qaim Ali Beg v. Hingun, 3 Sel. Rep., 152, 154 670
Queoff v. Amanulla, 12 B. L. R., Ap., 15.; 21 W. R., Cr., 49 ... 646
Queen v. Anderson, L. R., 1 Cr. Ca., 161 783
Queen v. Bajo Huri, 19 W. R., Cr., 37 331
Queen v. Belat Ali, 10 B. L. R., 458 645
Queen v. Bhola Nath Sen, I. L. R., 2 Calc., 23 407
Queen v. Chando Chandalinee, 24 W. R., Cr., 55 332
Queen v. Elahi Bux, B. L. R., Sup. Vol., 459; 5 W. R., Cr., 80 ... 646
Queen v. Gonesh Koormee, 4 W. R., Cr., 1 644
Queen v. Gopai, 2 N. W. P. (All.,) H. C., 430 985
Queen v. Gopal Dass, I. L. R., 3 Mad., 271 393
Queen v. Gunesh Sircar, 7 W. R., Cr., 38 624
Queen v. Hurdut Surma, 8 W. R., Cr., 68 646
Queen v. Hurribole Chunder Ghose, I. L. R., 1 Calc., 207 ... 394
Queen v. Majohur Roy, 24 W. R., Cr., 11 648
Queen v. Mohesh Biswas, 19 W. R., Cr., 16 ... ... 332, 646
Queen v. Nawab Jan, 8 W. R., Cr., 18 646
Queen v. Noakes, 5 C. and P., 326 646
Queen v. Nourjan, 6 B. L. R., Ap. 34; 14 W. R., Cr., 39 ... 98
Queen v. Sheffield Railway Company, 11 A. and E., 194 ... 323
Queen v. Smith, L. R., 1 C. C. R., 270 759
Queen v. South Wales Railway Company, 13 Q. B., 988 ... 323
Queen v. Surroop Chunder Paul, 12 W. R., Cr. 75 ... ... 403, 971
Queen v. Thompson, 1 B. L. R., O. Cr., 1 783
Queen v. Wazira, 8 B. L. R., Ap., 63 649
Queen-Empress v. Abaji Ram Chandra, I. L. R., 16 Bom., 165 ... 331
Queen-Empress v. Arumuga, I. L. R., 12 Mad., 196 646
Queen-Empress v. Balya Somya, I. L. R., 15 Bom., 369 331
Queen-Empress v. Barton, I. L. R., 16 Calc., 238 783
Queen-Empress v. Burke, I. L. R., 6 All., 224 331
Queen-Empress v. Chandi Singh, I. L. R., 14 Calc., 395 ... 124
Queen-Empress v. Ganu Sonba, I. L. R., 12 Bom., 440 393
Queen-Empress v. Hargobind Singh, I. L. R., 14 All., 242 ... 93
Queen-Empress v. Husein Gaibu, I. L. R., 8 Bom., 307 ... 610
Queen-Empress v. Kamalia, I. L. R., 10 Bom., 595 645
Queen-Empress v. Kartick Chunder Das, I. L. R., 14 Calc., 721 ... 733, 766
Queen-Empress v. Namdev Satvaji, I. L. R., 11 Bom., 372 ... 648
Queen-Empress v. Nilmadhab Mitter, I. L. R., 15 Calc., 595 ... 644
Queen-Empress v. O'Hara, I. L. R., 17 Calc., 642 ... ... 332, 646
Queen-Empress v. Ram Narain, I. L. R., 8 All., 514 94
Queen-Empress v. Ram Saran, I. L. R., 8 All., 306 621
Queen-Empress v. Rangi, I. L. R., 10 Mad., 313 646
Queen-Empress v. Samiappa, I. L. R., 15 Mad., 63 393
Queen-Empress v. Vinan, I. L. R., 9 Mad., 224 644
Queen-Empress v. Viraperumal, I. L. R., 16 Mad., 105 ... 124

R.

Rabbaba Khanum v. Noorjehan Begum, I. L. R., 13 Calc., 90 ... 541
Radha Charan Ghatak v. Zamirunnissa Khatun, 2 B. L. R., A. C., 67; 11 W. R., 83 248
Radha Madhab Santra v. Lakhi Narain Roy Chowdhry, I. L. R., 21 Calc., 428 516
Radha Pershad Misser v. Monohur Das, I. L. R., 6 Calc., 317 ... 120
Raghauandun Pershad v. Bhugoo Lall I, L. R., 17 Calc., 268 ... 24

PAGE

Rajah of Pittapur *v.* Venkata Mahipati Surya, I. L. R., 8 Mad., 520; L. R., 12 I. A., 119 163
Rajani Kanth Nag, Rai Chowdhuri *v.* Harimohan Guha, I. L. R., 12 Calc., 470 571
Rajendra Narain Bagchi *v.* Watson & Co., I. L. R., 18 Calc. 510 ... 571, 797
Raj Mohun Gossain *v.* Gour Mohun Gossain, 4 W. R., 47; 8 Moo. I. A., 91 616
Rama Chandra *v.* Venkatarama, I. L. R., 13 Mad., 516 571
Rama Kurup *v.* Sridevi, I. L. R., 16 Mad., 290 521
Ram Chandra *v.* Venkatarama I. L. R., 13 Mad., 516 797
Ram Chandra Pandurang Naik *v.* Madhav Purushottam Naik, I. L. R., 16 Bom., 23 272
Ram Churn Pooree *v.* Nunhoo Mundul, 14 W. R., 147 191
Ram Culpo Bhattacharji *v.* Ram Chunder Shome, I. L. R., 14 Calc., 352 546
Ram Das Maghi, In the matter of the petition of, I. L. R., 13 Calc., 110 93
Ramessuri Dassee *v.* Doorgadass Chatterjee, I. L. R., 6 Calc., 103 ... 22
Ram Ghulam *v.* Dwarka Rai, I. L. R., 7 All., 170 ... ... 990, 993
Ramgopal *v.* Shumskaton, I. L. R., 20 Calc. 93; L. R., 19 I. A., 228 509
Ram Kant *v.* Ram Lochan, S. D. A. 1859, p. 535 470
Ramkrishna *v.* Kunikal, I. L. R., 11 Mad., 445 570
Ram Mohun Doss *v.* Jhuppoo Doss, 14 W. R., 41 248
Ram Paul Singh, *In re*, 8 C. L. R., 14 636
Ramratan Sukal *v.* Nandu, I. L. R., 19 Calc., 249; L. R., 19 I. A., 1... 508
Ramtahal Ram *v.* Rameshar Ram, I. L. R., 8 All., 140 271
Randal *v.* Randal, 7 East., 81 594
Ranjit Singh *v.* Jagannath Prosad Gupta, I. L. R., 12 Calc., 375 ... 345
Rathnasami *v.* Subramanya, I. L. R., 11 Mad., 56 ... ... 570, 797
Rayner *v.* Cochler, L. R., 14 Eq., 262 317
Reg *v.* Boswell, 2 Cr., and M., 584 645
Reg *v.* Deva Dayal, 11 Bom., 237 648
Reg *v.* Elmstone, 7 Bom., Cr., 89 783
Reg *v.* Fatler, 8 C. and P., 106 ... ... 332, 646
Reg *v.* Garbad Bechar, 9 Bom., 344 644
Reg *v.* Gibson, 16 Cox C. C., 181 407
Reg *v.* Mount, L. R. 6 P. C., 283 784
Reg *v.* Ragha Naranji, 7 Bom., H. C. Cr. Ca., 31 624
Reg *v.* Rahimat, I. L. R., 1 Bom., 147 168
Reg *v.* Thompson, 2 Q. B., 12 645
Rex *v.* Duchess of Kingston, 2 Sm. L. C. 593; 20 How. St. Tr., 544 614
Rex *v.* Wilkes, 7 C. and P., 272 646
Rhodes *v.* Dawson, L. R., 16 Q. B. D., 548... 527
Richards, *In re*, 50 L. T., 22 494
Rogers *v.* Comptoir d'Escompte de Paris, L. R., 3 P. C., 465 ... 342, 995
Roghoonath Mundul *v.* Juggut Bundhoo Bose, I. L. R., 7 Calc., 214, 238, 241
Rooper *v.* Harrison, 2 K. and J., 86 570
Rukhinee Bullubh *v.* Brojo Nath Sircar, I. L. R., 5 Calc., 308 ... 559
Rung Lall *v.* Hem Narain Gir, I. L. R., 11 Calc., 166 215

S.

Sadakat Hossein *v.* Mahomed Yusuf, I. L. R., 10 Calc., 663; L. R., 11 I. A., 31... 671
Sadhusaran Singh *v.* Panchdeo Lal, I. L. R., 14 Calc., 1 ... 362, 365
Saiyad Wali Ulla *v.* Miran Saheb, 2 Bom., 285 672

PAGE

Sakharam Ramchandra Dikshit *v.* Govind Vaman Dikshit, 10 Bom., H. C., 361 442
Salkeld,-*Ex-parte*, 3 Mont, D. and D., 125 1019
Samal Nathu *v.* Jai Shankur Dalsukram, I. L. R., 9 Bom., 254 ... 227
Samson, In the goods of, L. R. 3 P. and D., 48 199
Saroda Soondury Dossee *v.* Dayamoyee Dossee, I. L. R., 5 Calc., 938 15
Sashti Charan Chatterjee *v.* Tarak Chandra Chatterjee, 8 B. L. R., 315 215
Savitribai *v.* Luxmibai, I. L. R., 2 Bom., 573 689
Scott *v.* Key, 35 Beav., 291 ... ... 689, 696
Secretary of State for India *v.* Nitye Singh, I. L. R., 21 Calc., 38 ... 379
Seetanath Ghose *v.* Madhub Narain Roy Chowdhry, 1 W. R., 329 ... 520
Sefton *v.* Hopwood, 1 F. and F., 579 293
Sew Bux Bogla *v.* Shib Chunder Sen, I. L. R., 13 Calc., 225 ... 803, 813
Shadhoo Singh *v.* Ramanoograha Lall, 9 W. R., 83 989
Shaik Saheb *v.* Mahomed, I. L. R., 13 Mad., 510 272
Shama Pershad Roy Chowdhry *v.* Hurro Pershad Roy Chowdhry, 10 Moo. I. A., 203... 996
Sharo Bibi *v.* Baldeo Das, 1 B. L. R., O. C., 24 ... ... 740, 745
Shekaat Hosain *v.* Susi Kar, I. L. R., 19 Calc., 783 725
Sheo Prasad *v.* Hira Lal, I. L. R., 12 All., 440 67
Sheo Shunkur Sahoy *v.* Hirdey Narain Sahu, I. L. R., 6 Calc., 25 ... 875
Shewbarat Koer *v.* Nirpat Roy, I. L. R., 16 Calc., 596 781
Shib Narayan Pohraj *v.* Kishore Narayan Pohraj, 1 B. L. R., A. C., 146 ; 10 W. R., 131 993
Shiboo Narain Singh *v.* Mudden Ally, I. L. R., 7 Calc., 608 ... 433
Shivaji Yesji Chawan *v.* The Collector of Ratnagiri, I. L. R., 11 Bom., 429 632
Shivapa *v.* Shivapanch Lingapa, I. L. R., 11 Bom., 284 ... 261
Shivappa, *In re*, I. L. R., 15 Bom., 11 93
Singaracharlu *v.* Sevabai, I. L. R., 11 Mad., 498 570
Sirdhar Roy *v.* Rameswar Singh, I. L. R., 15 Calc., 166 ... 681
Sivasangu *v.* Minal, I. L. R., 12 Mad., 277 700
Smethurst *v.* Tomlin, 30 L. J. Pro., 269 ; 2 Sw. and Tr., 143 ... 199
Soames *v.* Martin, 10, Sim., 287 688
Sohun Lall *v.* Lala Gya Pershad, 6 N. W., 265 521
Sonatan Shah *v.* Ali Newaz Khan, I. L. R., 16 Calc., 423 ... 28
Soobul Chunder Law *v.* Russick Lal Mitter, I. L. R., 15 Calc., 202 ... 813
Soorjeemoney Dossee *v.* Denobundhoo Mullick, 6 Moo. I. A., 526 688
Soorjomonee Dayee *v.* Suddanand Mohapatter, 12 B. L. R., 304; 20 W. R., 377 433
Sreemutty Dossee *v.* Tara Churn Coondoo, Bourke. A. O. C., 48 ... 749
Sree Narain Rai *v.* Bhya Jha, 2 Sel. Rep. (O), 23 (N), 29 ... 345
Sreeram Chowdhry *v.* Denobundhoo Chowdhry, I. L. R., 7 Calc., 490 215
Sreenath Kur *v.* Prosonno Kumar Ghose, I. L. R., 9 Calc., 934 ... 14
Staniland *v.* Staniland, 34 Beav., 536 688
Stone *v.* Phillips, 4 Bing., N. C., 37 594
Stubb's Case, 1 Dears., C. C., 555 646
Subbammal *v.* Venkatarama, I. L. R., 10 Mad., 289 ... ... 571, 797
Sudharam Patar *v.* Sudharam, 3 B. L. C., A. C. 91. ; 11 W. R., 457 469
Surnomoyee *v.* Luchmeeput Doogur, 9 W. R., 338 509
Suttom *v.* Weeley, 7 East., 442 1019
Sutton *v.* Sadler, 3 C. B., N. S., 87 ; 26 L. J., C. P., 684 ... 291
Swamirao Narayan Despande *v.* Kashinath Krishna Mutalick Desai, I. L. R., 15 Bom., 419 440
Swinfen *v.* Swinfen, 1 F. and F., 584 293
Swinfen *v.* Swinfen, 29 Beav., 148 294
Tarachand Coondoo, In the matter of, Bourke, Pt. V., 3 ... 749

PAGE

T.

Tara Munnee Dossee *v.* Motee Buneanee, 7 Sel. Rep., 273 ... 700
Tarini Prasad Chatterjee *v.* Bhola Nath Mookerjee, I. L. R., 21 Calc., 190 (note) 192
Thakoor Churn Roy *v.* The Collector of the 24-Parganas, 13 W. R., 336 77
Thakoor Doyal Sen, *In re*, 17 W. R., Cr., 51 648
Thorp *v.* Owen, 2 Hare, 607 696
Thumbaswamy Mudelly *v.* Hossain Rowthen, I. L. R., 1 Mad., 1; L. R., 2 I. A., 241 887
Tietkens, *In re*, 1 B. L. R., O. C., 84 636
Tiluck Chand *v.* Soudaminy Dasi, I. L. R., 4 Calc., 566 ... 146
Triccam Panachand *v.* Bombay, Baroda and Central Indian Railway Company, I. L. R., 9 Bom., 244 178
Tripura Sundari *v.* Durga Churn Pal, I. L. R., 11 Calc., 74 ... 801
Tupsee Singh *v.* Ram Sarun Koeri, I. L. R., 15 Calc., 376 ... 945
Turner *v.* Berry, 5 Exch., 858 426

U.

Umes Chunder Sircar *v.* Zahur Fatima, I. L. R., 18 Calc., 164; L. R., 17 I. A., 201 371
Ununt Ram Hazrah *v.* Kuralee Pershad Mistree, 23 W. R., 441 ... 993
Unwin *v.* Clarke, L. R., 1 Q. B., 417 264
Uzir Ali *v.* Ram Kumol Shaha, I. L. R., 15 Calc., 383... ... 942

V.

Vellaya *v.* Jaganatha, I. L. R., 7 Mad., 307 24
Vengamuthu *v.* Pandaveswara Gurukal, I. L. R., 6 Mad., 151 ... 369
Venkatachalam *v.* Mahalakshmamma, I. L. R., 10 Mad., 272 ... 272
Venkubai *v.* Laksham Venkoba Khot, I. L. R., 12 Bom., 617 ... 803
Viraraghava *v.* Venkata, I. L. R., 16 Mad., 287 791
Viraraghava Reddi *v.* Subbakka, I. L. R., 5 Mad., 397... ... 456
Vishvanath Maheshvar *v.* Virchand Panachand, I. L. R., 6 Bom., 16 813
Vyankatesh Ram Chundra Jogekar *v.* Bolajirav, 1 Bom., 184 ... 218

W.

Wahid Ali *v.* Nuran, I. L. R., 11 Calc., 597.; L. R., 12 I. A., 91... 498
Wakefield *v.* Lanelly Railway Co., 11 Jur., N. S., 456 594
Walesby *v.* Goulston, L. R., 1 C. P., 567 420
Waliulla *v.* Miran Saheb, 2 Bom., 285 672
Walton *v.* Everard, L. R. (1891), 2 Q. B., 369 ... ... 876, 879
Watkins *v.* Dhunnoo Baboo, I. L. R., 7 Calc., 140 ... ... 874, 880
Watson and Co. *v.* Ram Chand Dutt, I. L. R., 18 Calc., 10; L. R., 17 I. A., 110 344
Whittel *v.* Dudin, 2 J. & W., 29... 491
Williamson *v.* Jodwell, L. R., 13 Ch. D., 564 688
Wilmet *v.* Pike, 5 Hare, 14 570
Wilson *v.* Church, L. R., 11 Ch. D., 576 563

PAGE

Wilson *v.* Town Clerk of Salford, L. R., 4 C. P., 398 748
Wiltshire *v.* Rabbits, 14 Sim., 76 570
Winckworth *v.* Winckworth, 8 Beav., 576 491
Woomesh Chunder Goopto *v.* Rajnarain Roy, 10 W. R., 15 ... 707

Y.

Yacoob *v.* Adamson, I. L. R., 13 Calc., 272 95
Yar Ali, In the matter of, 13 W. R. Cr., 70 331

Z.

Zainulabdin Khan *v.* Ahmed Raza Khan, I. L. R., 2 All., 67 ; L. R., 5 I. A., 233 271
Zuheerooddeen Paikar *v.* Campbell, 4 W. R., 57 234

BENGAL SECRETARIAT LIBRARY

THE...

INDIAN LAW REPORTS,

Calcutta Series.

PRIVY COUNCIL.

ROMESH CHUNDER MUKERJI, *alias* MONI BHUSAN, BY HIS GUARDIAN RAKHALDAS CHATTERJI (OBJECTOR) *v.* RAJANI KANT MUKERJI (PETITIONER).

*PC**
1893
February
May 13.

[On appeal from the High Court at Calcutta.]

Will—Execution of will—Probate and Administration Act (V of 1881), s. 50—Evidence as to the execution of a will by a person near death.

On a question of fact, raised in 1887, whether an alleged testator had or had not been able to duly execute his will, as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. The judgment of the High Court which would have revoked the probate granted in 1882, was reversed, upon the consideration of conflicting evidence as to the mental capacity of the testator, and as to the genuineness of his signature.

APPEAL from a decree (24th July 1889) of the High Court reversing a decree (25th April 1888) of the District Judge of Murshidabad.

This appeal on behalf of a minor adopted son, Romesh Chunder Mukerji, formerly named Moni Bhusan, by his guardian, appointed for the suit, Rakhaldas Chatterji, resulted from the dismissal by the High Court of a petition (17th November 1887) by the present respondent Rajani Kant Mukerji, under sections 50 and 51 of Act V of 1881, the Probate and Administration Act, for the revocation of the probate (15th April 1882), granted by the District Court,

* *Present*: LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.

1893

ROMESH CHUNDER MUKERJI v. RAJANI KANT MUKERJI.

of the will of Iswar Chunder Mukerji, late of Saidabad, in the Murshidabad district, who died on the 15th February 1882. The petitioner for this revocation, Rajani Kant Mukerji, as the nearest agnatic relation of the deceased, alleging that he had not been cited in the proceedings in 1882, sought to maintain that the will had not, in fact, been executed by the alleged testator, who was too ill to have executed it at the time when he was alleged to have done so, and that the probate had been wrongly granted. It had been granted to Brojo Sundari Debi, the childless widow of the alleged testator, and the petitioner insisted that her adoption under it of Moni Bhusan, now named Romesh Chunder Mukerji, was invalid in consequence of the will being a false one.

On the 9th September 1887, Ramlal Siramoni, the natural father of Moni Bhusan, filed objections on his behalf, and Rakhaldas Chatterji (who was the executor named in the will, but who had in 1882 withdrawn in favour of Brojo Sundari) having done the same, he, Rakhaldas, was appointed guardian of the minor *ad litem*. On this petition the District Judge was of opinion that the petitioner Rajani Kant Mukerji, not having been cited in 1882, also had no actual notice of the proceedings in that year. He disallowed an objection that he came too late, considering that article 178 of the second schedule of the Limitation Act did not apply. He held the burden of proof to be on the objectors, the party propounding the will. On a consideration of all the evidence, he found that the will was duly executed by Iswar Chunder Mukerji, who before executing the will gave his wife permission to adopt a son to him. He also found, as a fact, the adoption of this son of Ramlal Siramoni by Brojo Sundari before her death. He ordered that each party should pay his own costs, as in his view of the case, Rajani Kant was entitled to demand that the will should be proved in solemn form.

The District Judge having dismissed the petition, his decree was reversed on appeal by the High Court (PETHERAM, C.J., and GORDON, J.) upon the evidence as to the state of the testator at the time when he was alleged to have signed his will. Upon this difference the question now raised related to that evidence. Their Lordships' judgment states the previous proceedings in the case, as well as the facts.

Mr. *T. H. Cowie*, *Q. C.*, and Mr. *J. H. A. Branson*, appeared for the appellant.

Mr. *R. V. Doyne* for the respondent.

Bama Sunderi Debi v. *Tara Sunderi Debi* (1) was referred to.

Afterwards, on the 13th May, their Lordships' judgment was delivered by

LORD MORRIS.—This case comes on appeal from a judgment of the High Court at Calcutta, dated the 24th July 1889, reversing the judgment of the District Judge of Murshidabad, dated the 25th April 1888. It appears that one Iswar Chunder Mukerji died on the 3rd Falgoon 1288, corresponding with the 15th February 1882, leaving a childless widow, Brojo Sundari Debi; that on the 1st March following one Rakhaldas Chatterji petitioned the Court of the District Judge of Murshidabad for probate of the will of the said Iswar Chunder Mukerji, dated the day before his death, by which the said Rakhaldas Chatterji was appointed executor; that Rakhaldas having subsequently withdrawn in favour of the widow Brojo Sundari, probate of the will was, on the petition of the widow, granted to her on the 15th April 1882, and authority given to her, with the consent of Rakhaldas to manage Iswar's properties and do all acts in connection with his will.

The first clause of the will gives to the widow power to adopt three sons in succession; the widow died on the 4th October 1887, having shortly before her death adopted the appellant. The respondent is the heir-at-law of Iswar, being his first cousin by half-blood. He was not cited and had no notice of the proceeding by the widow to prove the will. He, on the 17th November 1887, applied to the Court for the revocation of the probate. Several questions were argued before the District Judge:—Whether the respondent was the heir of Iswar; whether he was precluded by lapse of time from having a revocation of the grant of probate; whether the adoption of the appellant by the widow before her death was valid. But the only question raised before their Lordships has been the question of the authenticity and genuineness of the will.

(1) I. L. R., 19 Calc., 65; L. R., 18 I. A., 132.

1893

ROMESH CHUNDER MUKERJI v. RAJANI KANT MUKERJI.

The District Judge in a full, clear, and exhaustive judgment decided in favour of the will. The High Court on appeal reversed the judgment of the District Judge and held that the will was not a genuine will. Their Lordships have, therefore, to decide between these conflicting judgments. The evidence was conflicting as to the mental capacity of the testator and as to the genuineness of his signature. The leading facts as proved are as follows:—Iswar appears to have become ill at about eleven o'clock on the night of the 12th February 1891, and died about three o'clock on the morning of the 15th February. The evidence assigned some time between nine and eleven o'clock on the evening of the 14th February as the time when he executed the will. The illness from which he suffered was a kind of fever known under the name of *sajor* fever, which is attended with delirium and unconsciousness, but with intervals of consciousness. Eleven witnesses were examined on the part of the respondent against the will and about the same number on the part of the appellant to support the will. Apart from the two medical witnesses, Srichurn Roy Kobiraj and Beni Madhub Bose, the most important witnesses in opposition to the will were Jagadish Chunder, Radha Raman Roy, and Kedar Nath Sanyal. Jagadish Chunder, who was a nephew of the testator, stated that the will was written in a room in the testator's dwelling-house; that Kedar Sanyal, the pleader, dictated the will; and that Hurri Buttacharji wrote it, and then took it to the testator to sign it; that the testator did not sign it, and that Hurri Buttacharji asked the persons present to sign as witnesses, but that none would. He gives in detail the forgery of the name of the testator to the will by Hurri Buttacharji.

Radha Raman Roy gives evidence of Iswar's unconscious state on the 14th February; he alleges that he visited him at 2 and $\frac{3}{4}$ *prohurs* of the day on the 14th, and when 6 *dunds* of the day were remaining and at 4 *dunds* of the night and at 1 and $\frac{1}{2}$ *prohurs* of the night, periods corresponding with 2 p.m., 4 p.m., 7-30 p.m., and 10-30 p.m.; he alleges that he remained on his last visit to him till $2\frac{1}{4}$ *prohurs* of the night, or about a quarter to one o'clock, and that at this last period Hurri Buttacharji came to Iswar with a paper in his hand, but that he did not see Hurri Buttacharji put Iswar's signature to the paper.

Kedar Nath Sanyal, who is a pleader, stated that he was sent for by Tincowri Buttacharji, who was Iswar's principal man of business, at about half-past nine on the night of the 14th February; that Tincowri told him Iswar had lost his speech, but that Iswar had previously told him what he wished to have put in his will, and that if Iswar regained consciousness he would have it signed and sealed; that he, Kedar, then dictated the will on the instructions of Buttacharji; that it was first written out by Mohendra, a son of Rakhaldas, and was afterwards copied by Hurri Banerji or Chatterji.

Hurri Buttacharji, in support of the will, states that he wrote it from the draft made by Mohendra at the dictation of the pleader, and he gives evidence in detail of the execution of the will by Iswar. Rakhaldas, the executor, also describes in detail the signing and execution of the will by Iswar. Gokul Krishna proves that about twelve at noon on the 14th February he heard Iswar say to his wife, who was then crying, that she should adopt three sons in succession, and heard him tell Tincowri and Hurri Buttacharji to go and prepare a will, and bring it to him. Gokul further confirms the account given by Hurri Buttacharji and Rakhaldas of the execution of the will. There were four witnesses to the will. Two of them were dead at the time of the trial before the District Judge, Tincowri Buttacharji and Kali Churn Banerji. The evidence of Tincowri, if available, would be of the highest value, he being the person who, according to the evidence of Kedar, alleged that he had received Iswar's instructions; he was his principal officer and much trusted by him; his action, on the assumption that he was a trustworthy person, strongly supports the will.

The District Judge, who had the opportunity of observing the demeanour and manner of the witnesses, after reviewing the circumstances of the case came to apparently a clear conclusion in favour of the veracity of the witnesses who supported the will. On appeal before the Chief Justice and Mr. Justice Gordon, the learned Chief Justice, who gave the judgment of the Court, appears to have been influenced in his decision primarily by the evidence of the two medical witnesses, and also by his own observation of the alleged signature of Iswar to the will. He says on the latter point that the signature does not seem to be the signature of a dying

1893

ROMESH CHUNDER MUKERJI v. RAJANI KANT MUKERJI.

man, and that the character of the signature supports the evidence of the witnesses who said that the signature was attached by Hurri Buttacharji after Iswar's death. Their Lordships have had the opportunity of seeing the document; the signature is in Hindi characters, and they are unable to form any opinion on this point. Their Lordships cannot attach much importance to this ground of reversal of the District Judge's judgment, seeing that no evidence was given at the trial on this point, nor, so far as appears in the very careful judgment of the District Judge, was there any argument suggesting it. The Chief Justice considers the medical evidence conclusive proof of the impossibility of the genuineness of the will, and that it covers the entire period of forty-eight hours before Iswar's death, and shows his insensibility and inability to execute a will. The Chief Justice does not appear to have accurately collected the evidence on this most material point. He says there is some question as to whether the will was made about six or eight o'clock on the evening of the 14th February, and that Iswar died about one o'clock on the morning of the 15th, whereas the evidence for the will puts the making of it somewhere between nine and eleven. Kedar, the pleader, who was examined for the respondent, states that he only arrived at Iswar's house at from a quarter to half-past nine, and the death of Iswar would appear to have taken place about three o'clock on the morning of the 15th. The mistake as to the time of the making of the will becomes most vital, because Beni Madhub fixes the time of his second and last visit at between seven and eight o'clock on the evening of the 14th, when he says he found Iswar staring stupidly and unable to speak. Consequently, if the period of Beni Madhub's visit is made to correspond with the period of the execution of the will, his evidence would be, if credited, almost decisive against the will.

Beni Madhub only saw the deceased on two occasions during his illness, namely, at four or five o'clock on the evening of the 14th February, and again at seven or eight o'clock. On his first visit he could not say whether Iswar understood what he said, and he says Iswar was worse on his second visit. He further stated that he was not accompanied by Srichurn Roy Kobiraj on his visit at three or four o'clock.

Srichurn Roy Kobiraj's opportunity of observation of the deceased was very considerable. He says he cannot remember the month or year of the death of Iswar, but that he does recollect being called to visit him on the morning of the day before his death; that he saw Iswar that morning, again at noon, again in the afternoon, and also at night; that Iswar was overpowered by fever; that he was conscious to some extent, but that he could not speak; that he saw him again on the following morning; that Beni Madhub was then called in, and that they both saw Iswar between three and four o'clock on that afternoon. He states that he again saw Iswar at ten or eleven that night, and was with Beni Madhub. The period of time given by this witness for the second visit of Beni Madhub would correspond very much with the time when the will is alleged to have been made, but it is in contradiction of Beni Madhub's testimony, which fixes the period at seven or eight o'clock. He states that Iswar was then unconscious; that on the evening of the 14th February, Rakhaldas, whom he describes as "an intimate friend" of Iswar's, and "reckoned in society as a respectable man," told him "a deed will have to be executed," and that he saw "that a deed was commenced to be written;" Tincowri, Kedar, and Rakhaldas being present. He says he thought as Iswar was a rich man he would probably execute a deed. He admits that he heard of the will being made seven or eight days after Iswar's death. The evidence of these two medical witnesses is referred to by the District Judge, who comments on the discrepancies in their testimony and the impossibility of their accuracy of recollection without any notes after such a long interval. Their Lordships are unable to concur in the opinion that the evidence of Srichurn Roy and Beni Madhub completely disproves the case for the will, even on the assumption that their evidence was given truly. The disease afforded periods of consciousness, and if the deceased had previously given instructions to Tincowri in respect of the will, he and Rakhaldas would be ready to take advantage of any short period of consciousness to have the will executed. Neither of them derived any advantage under the will, except the indirect and very doubtful advantage that might accrue to Rakhaldas from being executor, which he abandoned by withdrawing in favour of the widow. Nor did she obtain any advantage or benefit; on the contrary, an

1893

ROMESH CHUNDER MUKERJI v. RAJANI KANT MUKERJI.

adoption by her of a son under the power given by the will would have the effect of depriving her of the possession of the property. A forgery in the circumstances stated by the witnesses for the respondent would, therefore, be not only an audacious act, but a worthless one to those engaged in it.

Again, the evidence of Srichurn Roy is open to grave remark. He admits that he knew that a forged will was being prepared and made no remonstrance, and that shortly after the death of Iswar he knew the forgery had been completed, yet made no communication to any one on the subject.

On the whole, the opinion of their Lordships concurs in result with that of the District Judge, and they will humbly advise Her Majesty that the judgment of the High Court ought to be reversed and the judgment of the District Judge restored. The respondent must pay the costs of the appeal to the High Court and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Morgan, Price,* and *Mewburn.*

Solicitors for the respondent: Messrs. *T. L. Wilson and Co.*

C. B.

---

*P C**
1893
May 11
June 17.

HARI NATH CHATTERJEE (PLAINTIFF) *v.* MOTHURMOHUN GOSWAMI (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Limitation Act (XV of 1877*), art.* 141—*Act IX of* 1871, *art.* 142—*Dismissal of Hindu daughter's claim as heiress of a share, as barred by time, Effect of in regard to right of reversioner after her—Res judicata—Adverse possession.*

In a suit in which the parties were descendants of a common ancestor, who had daughters only, one of the latter having been the mother of the first defendant who was in possession of the ancestral estate, the plaintiff, son of the last surviving daughter, claimed, on her death, possession of his share by inheritance, and also of a share acquired by him by gift from another of the defendants, a son of another daughter of the common ancestor.

* *Present:* LORD WATSON, SIR R. COUCH, and the HON'BLE GEORGE DENMAN.

The defence was that a suit, brought by the plaintiff's mother, in her lifetime, against the same defendant, for her share, had been dismissed by a final judgment on the ground of her claim having been barred by limitation. *Held*, that the estate which would have devolved on the plaintiff's mother as survivor of her sisters, was similar to the inheritance of a widow, the same result following the dismissal of the daughter's suit that ensued in regard to the decree adverse to the widow in *Katama Natchiar* v. *The Raja of Shivagunga* (1), where a decree, duly obtained against the widow, bound the reversioner. The previous decree dismissing the daughter's suit as barred was binding on her son. His claim therefore failed, not only as to his share by inheritance, but, for similar reasons, as to the share acquired by him from the defendant donor.

Article 141 in the schedule to Act XV of 1877, fixing the date of the female heir's decease as the starting point for limitation, did not alter the existing law as to the effect of a decree adverse to the predecessor as representing the estate, nor did it give a new starting point to the successor, nor did Art. 142 in the schedule to Act IX of 1871.

Appeal from a decree (27th May 1890) of the High Court, reversing a decree (13th July 1888) of the Subordinate Judge of Cuttack.

THIS suit was brought on the 6th April 1887, the plaintiff claiming a joint two-thirds share in the estate of Ramanundun Goswami, deceased in 1847, leaving five daughters but no son. Part of the estate consisted of village lands held for the maintenance of a *mandir*, or *math*, in the Balasore district, of which institution Ramanundun was the *shebait*. The rest of the estate was his private property. The whole was valued at Rs. 21,386.

The object of the suit was to have established against the defendant, now respondent, the plaintiff's right to possession jointly with him of an inherited one-third share in the estate left by Ramanundun, the plaintiff's maternal grandfather; together with another one-third share, given to the plaintiff by Thakurdas, another grandson of the deceased *shebait*, who was alleged to have inherited through a daughter, like the plaintiff, and who admitted his claim.

The plaintiff made title as the son of Sampurna, the youngest of Ramanundun's five daughters, and two of the defendants were sons, and the third defendant was grandson, of other daughters

(1) 9 Moo. I. A., 539.

1893

HARI NATH CHATTERJEE v. MOTHURMOHUN GOSWAMI.

respectively. The descents from Ramanundun, and all the other facts in this case, appear in their Lordships' judgment.

After the filing of this appeal, an application was made to add to the record a transcript of the judgment that dismissed Sampurna's suit on the 27th June 1881. The ground of that dismissal was that her suit, as against Mothurmohun, was barred by limitation. The principal question now raised was as to the effect of that decision upon the plaintiff's right to maintain this suit.

The Subordinate Judge held that the suit was not barred by limitation, the plaintiff's cause of action having arisen on the death of Sampurna, and the plaintiff, therefore, having twelve years from that date, under Article 141 of schedule II of Act XV of 1877. He decreed in favour of the plaintiff with exception to part of the property; as to which there was no appeal. This judgment on the appeal of the defendant, Mothurmohun, was reversed by a division Bench of the High Court (NORRIS and MACPHERSON, JJ. They said:—

"We think that the appeal must succeed on the one ground that the plaintiff is bound by the decree in the suit which his mother brought against the defendant No. 1. The Subordinate Judge disposed of this point in a few words. He says that the plaintiff's case is not barred under the present law of limitation, as his cause of action arose on his mother's death, and he has twelve years from that time within which he can sue (article 141, Act XV of 1877), and that he was not bound by the decree which was made against his mother, because he does not claim through her.

"So far as the question of limitation is concerned, we are, of course, bound to follow the decision of a Full Bench of this Court in *Srinath Kur* v. *Prosunno Kumar Ghose* (1). That was a case somewhat similar to this, in that the contending parties were the sons of two daughters of the ancestor from whom each of them derived title. It was found that the mother of the plaintiff had been out of possession for upwards of twelve years, and it was contended that, under those circumstances, the adverse possession which extinguished her right, extinguished that also of the reversioner, her son. The Court, without going into the question whether the right was, or was not, extinguished, held that under the present law of limitation a reversioner who succeeds to immoveable property has twelve years in which to bring his suit from the time when his estate falls into possession, and that the plaintiff was therefore entitled to the properties claimed. It may be observed that that case was decided under Article 140, and not

(1) I. L. R., 9 Calc., 934.

Article 141, of the Limitation Act, which seemed directly in point. It did not, therefore, directly overrule the case of *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (1), in which Jackson and Tottenham, JJ. held that article 142, Act IX of 1871, which corresponds with article 141, Act XV of 1877, only covered a case in which the person claiming succeeded to a certain right which was in being on the widow's death, and that if the widow's right was barred before her death, the reversioner would not be entitled to possession. The effect, however, undoubtedly was to overrule it, as it was alluded to in the referring order, and was in fact the case which led to the reference. If, therefore, the question in the present case was merely one of limitation, we should be bound to follow the Full Bench decision, and hold that the suit was within time, whether all or any of Ramanundun's daughters had or had not been in possession. The decision of the Full Bench does not, however, touch the question whether the reversioner is not bound by a decree adverse to the person in whom the estate is for the time being vested, and there is the clearest and highest authority that he is bound. In the *Shivagunga case* (2) their Lordships of the Privy Council, alluding to a Hindu widow who had brought a suit for possession of her husband's estate, say at p. 604 of the report, 'that unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to her.' 'For,' they say, 'assuming her to be entitled to the zamindari at all, the whole estate would for the time being be vested in her absolutely, for some purposes, though in some respects for a qualified interest; and until her death, it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, seems to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.' The principle thus laid down was applied by the Privy Council in the case of *Pertab Narain Singh* v. *Trilokinath Singh* (3).

"The same principle was affirmed in the case of *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (4) decided by a Full Bench of this Court. The question there was, whether adverse possession against a Hindu female heir, which would bar her suit if she were alive, will equally bar that of the reversioner; and Sir Barnes Peacock, after citing the *Shivagunga case*,

(1) I. L. R., 5 Calc., 938.
(2) 9 Moo. I. A., 539.
(3) I. L. R., 11 Calc., 186; L. R., 11 I. A., 197.
(4) B. L. R., Sup. Vol. 1008; 9 W. R., 505.

1893

HARI NATH CHATTERJEE v. MOTHUR-MOHUN GOSWAMI.

says, If the female heir in the present case had sued the wrong-doer, and without fraud or collusion had failed to turn him out of possession, the reversionary heirs would have been bound by the decision.' Again, in *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) their Lordships of the Privy Council cite the *Shivagunga case* as showing that in a suit against the widow in respect of the estate, the decision would be binding upon the reversionary heir. That was a case in which a decree had been obtained against the widow in possession of the estate, and in execution of the decree the estate was sold. It was held, under the circumstances of the case, that the entire estate, which she fully represented, was sold, not merely her life-interest in it. There is no difference as regards the representation of the estate between the estate of a Hindu widow and that of a daughter; and it would be the same if the suit failed on proof of an adverse title or on a plea of adverse possession and limitation. It was argued by the Advocate-General that the principle enunciated in the *Shivagunga case* would only apply when the suit was against a stranger, and that it would have no application when the suit was against a member of the same family. No doubt Mothur Mohun, who was the defendant in the suit brought by Sampurna, and who is the defendant in the present case, is himself one of the reversionary heirs. In the *Shivagunga case* the suit was by a widow of the deceased owner against his nephew, the questions involved being whether there had been a division, and whether the property was self-acquired. It was held that a decree properly obtained against the widow would bind all the reversionary heirs. We see, however, no ground for the distinction contended for. The estate is vested in the widow or daughter for the time being, and she represents it absolutely for some purposes. She cannot so represent it against some persons and not against others, and we do not see why a reversioner setting up an adverse title and adverse possession is in a worse position than any one else.

It is not contended that the decree in the suit which Sampurna brought would not put the plaintiff completely out of Court if he is bound by it or that that decree was not properly and fairly obtained; there is no reason to doubt that it was so obtained, and the plaintiff admits that he carried on the suit on his mother's behalf. We think, therefore, that on the authorities cited, the plaintiff is bound by the decree in the previous suit, and that he cannot maintain this suit, either as regards his own one-third share or as regards the share acquired from Thakurdas, who is equally bound by that decree.

"The position may be anomalous. According to the decision of the Full Bench of this Court in *Srinath Kur* v. *Prosonno Kumar Ghose* (2), no length of possession adverse to the widow would bar the reversioners, who

(1) I. L. R., 10 Calc., 985; L. R., 11 I. A., 66.
(2) I. L. R., 9 Calc., 934.

have twelve years reckoned from the widow's death within which to sue, but if the widow sues to recover the property from the person in adverse possession and fails, the reversioners are bound by the decree. The decision of the Full Bench rests upon the words of the present Limitation Act; but it certainly seems to strike at the principle on which *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) was decided, although it was simply held that the law of limitation by which the latter case was governed had been altered. However this may be, the question which we have to decide was not before the Full Bench and was not decided by it, and we are bound to follow the high authority which we have cited."

The Court, after referring to other points raised for the appellant, before them, decreed the appeal for the reasons above stated, and dismissed the suit with costs of both Courts.

From this decision the plaintiff appealed.

Mr. *R. V. Doyne*, for the appellant argued that the decree of June 27th 1881 did not preclude him from suing. Limitation did not begin to run against him till the death of the female heir. These being the principal points, it was also to be observed that the judgment of June 27th 1881 was not put in evidence at the hearing of the suit, and that the High Court decided the case upon it without having ascertained its exact terms. Nor was there any issue framed as to its effect, so as to raise the question whether what had been in issue in the former suit brought by his mother was again, directly and substantially, in issue in this. The judgment of the High Court did not proceed under section 13, Civil Procedure Code; but the plaintiff's case was decided to be concluded against him in consequence of the decree against Sampurna in 1881, based upon a judgment, not upon title, and not upon the merits, but upon limitation. Sampurna's title, that of a daughter, exactly resembled a widow's, in reference to the reversionary heirs. Her successor's title was subject to the limitation in article 141 of Act XV of 1877, schedule II, making the period start from the death of the female. *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) was decided, under the law of Act XIV of 1859, to the effect that adverse possession against a female heir which would bar her right of possession would equally

(1) B. L. R., Sup. Vol., 1008; 9 W. R., 505.

1893

HARI NATH CHATTERJEE v. MOTHURMOHUN GOSWAMI.

bar that of the reversioner. His right was affected by the expiration of the period in the widow's lifetime; but from this, which might have been a hardship, he was relieved by article 142 of Act IX of 1871, which made the death of the widow the starting point, and was followed by article 141 in the schedule to Act XV of 1877. *Srinath Kur* v. *Prosonno Kumar Ghose* (1), under the later law, allowed twelve years from the time when his estate fell into possession.

The *Shivagunga case* (2), as to the effect of a decree, adverse to the widow as representing the estate, upon the rights of heirs claiming to succeed her, related to a valid decree where that decree was upon the merits; but it might be doubted whether a decree founded upon limitation was comprehended in the rule that such a decree against the widow bound the heirs. In the decree of June 27th 1881 there was no affirmance that the defendant whom the female heir sued had the complete proprietary right as against others claiming to share the estate, and that decree, being only upon limitation, bound only the person against whom it was made. In the general law of limitation persons were allowed different periods of time within which to sue, and here the plaintiff was subject to a limitation different from that which was applicable to his predecessor in title, giving the date of the death of that predecessor as the starting point.

Mr. *C. W. Arathoon*, for the respondent, contended that the High Court had rightly decided that the plaintiff was bound by the decree of 1881, and that he could not maintain this suit. The judgment was right in pointing out that the decision of the Full Bench in *Srinath Kur* v. *Prosonno Kumar Ghose* (1) did not govern the question here, for though the words of articles 142 and 141 may have been rightly construed in that case, the main question now was whether the reversioner was not bound by the decree of 1881, dismissing the suit of the female heir on the ground of limitation. In her was vested, for the time being, the estate by the same title as that on which the present plaintiff relied, and she represented the estate. In regard to the judgment of 1881 not having been put in evidence, it was not a material

(1) I. L. R., 9 Calc., 934. (2) 9 Moo. I. A., 539.

objection. There had been given sufficient proof of the effect of the judgment for the Court to act upon it. The authorities cited in the judgment of the High Court from the *Shivagunga case* to *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) and *Pertab Narain Singh* v. *Trilokinath Singh* (2) showed that the succeeding heirs were bound by a decree fairly and properly obtained against the female heir. *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (3) was also cited as to limitation.

Mr. *R. V. Doyne* replied.

Afterwards, on the 17th June, their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal is whether the suit is barred by the law of limitation. It was brought to recover a two-thirds share of immoveable and moveable properties formerly in the possession of Ramanundun Goswami (Mukerji), to which he was said to be entitled, as to one part as *murfatdar* or *shebait*, and as to the other as *malik*. He died in 1847, leaving a widow, Pearimoni, his second wife, and five daughters, one having died in his lifetime. The eldest daughter, Drobomoni, died in 1867, leaving a son, Kala Chand, who died in the following year, leaving a son, Girish Chunder, who is the third defendant. The second daughter, Hurromoni, died in 1874, leaving a son, Mothurmohun, the first defendant. The third of the survivors, Motimoni, died in 1857 leaving a son, Thakurdas, the second defendant. The fourth died childless, and the last survivor, Sampurna, died on the 22nd February 1884, leaving a son, Hari Nath, who is the plaintiff. The plaint stated that, after the death of Hurromoni, Sampurna, who was then the only survivor of the daughters, placed the whole of the estate under the management of Mothurmohun, who some time after brought suits for rent against tenants, and, with a view of effecting registration in his own name under Bengal Act VII of 1876, made petitions; that thereupon Sampurna became an objector, and, the objections having been disallowed, she in 1879 brought a suit against Mothurmohun *in formâ pauperis*, which was dismissed on the 27th June

(1) I. L. R., 10 Calc., 985; L. R., 11 I. A., 66.
(2) I. L. R., 11 Calc., 186; L. R., 11 I. A., 197.
(3) I. L. R. 5 Calc., 938.

1893

HARI NATH CHATTERJEE v. MOTHURMOHUN GOSWAMI.

1881; that she preferred an appeal *in formâ pauperis* to the High Court, but the appeal not having been preferred within the prescribed time her application to prefer it *in formâ pauperis* was rejected, with liberty to prefer an appeal within six weeks on putting in the court fee; that she was unable to do this, and consequently the dismissal of her suit became final. The plaint further stated that Thakurdas, on a native date corresponding with the 17th August 1875, made to the plaintiff a gift of his share of one-third of the estate left by Ramanundun, making the plaintiff entitled to two-thirds as claimed. Mothurmohun in his written statement said that Sampurna, after the death of Pearimoni, instituted a suit for possession of all the properties under claim against him; that her claim was dismissed on the ground of limitation, it having been established that, after the death of Pearimoni, Sampurna was never in possession of the shebas and the other properties relating thereto left by Ramanundun.

The Subordinate Judge made a decree for possession by the plaintiff of the immoveable properties claimed in the plaint with the exception of some specified lands, and the plaintiff has not appealed against this exception. The defendant Mothurmohun appealed to the High Court. In the judgment of that Court it is said that "the defence, so far as it need be referred to, is that the claim is barred by limitation, as none of Ramanundun's daughters inherited or were in possession; that the plaintiff is bound by the adverse decree passed against Sampurna in the suit which she brought against defendant No. 1, and that he cannot bring another suit." This defence was distinctly asserted in the written statement, and no objection appears to have been taken that it was not raised by the issues which were settled. The judgment of dismissal of the 27th June 1881, although it had been filed with the plaint, was not put in evidence, and cannot be looked at; but the High Court had before it the statement in the plaint which admitted that there had been that judgment, and Mothurmohun said in his written statement that it was on the ground of limitation. There was thus sufficient evidence for the High Court to found its judgment upon.

It will be convenient here to notice the state of the law of limitation when the suit was brought in 1887. Prior to the

Limitation Act of 1871 the law under Act XIV of 1859 was that suits for the recovery of immoveable property must be brought within twelve years from the time the cause of action arose. By the Limitation Act of 1871 the whole of the Act of 1859 which applied to the limitation of suits was repealed; and by the fourth section it was enacted that, subject to the provisions contained in certain sections, every suit instituted after the period of limitation prescribed therefor by the second schedule to the Act should be dismissed, although limitation had not been set up as a defence. Art. 142 in the second schedule is as follows:—

"Like suit (that is, for possession of immoveable property) by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow. Period of limitation—twelve years. Time when period begins to run—when the widow dies."

In 1877 this Act was repealed and the Limitation Act of 1877 was passed. In that Act the same period of limitation was by Art. 141 prescribed to a suit by a Hindu or Mahomedan entitled to the possession on the death of a Hindu or Mahomedan female.

In the judgment of this Committee in the *Shivagunga case* (1) it is said (p. 604), with reference to an adverse decree in a suit brought by a Hindu widow for possession of a zamindari as heir to her husband, that if it had become final in her lifetime it would have bound those claiming the zamindari in succession to her; and unless it could be shown that there had not been a fair trial of the right in that suit, or in other words unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to the widow. The judgment in *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (2) quoted by the High Court, is not directly applicable to the present case. It is referred to in the judgment of this Committee in *Amirtolal Bose* v. *Rajoneekant Mitter* (3), where it is said that the rule there laid down had been acted upon in other cases, and it appeared to their Lordships that the principle of that decision is correct. In the latter case the suit was brought on the 8th September 1858 and the question of limitation had to be determined according to the old law.

(1) 9 Moo. I. A., 539. (2) B. L. R., Sup. Vol. 1008; 9 W. R., 505.
(3) 15 B. L. R., 10 (19); L. R. 2 I. A., 113 (121).

1893

HARI NATH CHATTERJEE v. MOTHUR-MOHUN GOSWAMI.

The estate to which Sampurna as the survivor of the daughters succeeded was similar to the estate of a widow, and the principle of these decisions applies equally to it. This being the law when the Act of 1871 was passed, the contention of the learned Counsel for the appellant was that the effect of Art. 142 in the schedule to that Act and of Art. 141 in the schedule to the Act of 1877 is that a decree founded upon the law of limitation is now excepted from the rule laid down in the *Shivagunga case*, and that therefore the decree of 1881 only bound Sampurna, and the plaintiff had by the terms of Art. 141 a period of 12 years from her death to bring his suit. Their Lordships see no ground for this contention. The words "entitled to the possession of immoveable property" refer to the then existing law. Under that law the plaintiff being bound by the decree against Sampurna, would not be entitled to bring a suit for possession. The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The purpose of the second schedule in each of the Acts is only to prescribe the period of limitation for the suit. That appears from the 4th section of each Act. The prescribed periods are to be applied to suits founded on the existing law, and Art. 141 cannot be construed as altering the law respecting the effect of a decree. Their Lordships approve of the judgment of the High Court where it says "we think therefore that on the authorities cited the plaintiff is bound by the decree in the previous suit, and that he cannot maintain this suit, either as regards his own one-third share or as regards the share acquired from Thakurdas, who is equally bound by that decree." They will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal.

The appellant will pay the costs of this appeal, except the respondent's costs of the application to be allowed to lodge a certified copy of the judgment of the 27th June 1881 in the Privy Council Office. The respondent will pay the appellant's costs of that application.

Appeal dismissed.

Solicitors for the appellant: Messrs *Barrow* and *Rogers*.

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

SAHDEO PANDEY (DECREE-HOLDER) AND ANOTHER (AUCTION-PURCHASER), *v.* GHASIRAM GYAWAL (JUDGMENT-DEBTOR).*

1893 *August* 16.

Execution of Decree—Notice of Execution—Civil Procedure Code (Act XIV of 1882), *s.* 248—*Effect of omission to give Notice of Execution—Auction-purchaser.*

Where in execution of a decree, for the execution of which a notice to the judgment-debtor was necessary under s. 248 of the Civil Procedure Code, certain moveable property was attached and sold without any such notice having been given,—*Held*, that the proceedings in execution were void and of no effect, and it made no difference that the auction-purchaser was a third party and not the decree-holder.

Imamunnissa Bibi v. *Liakat Husain* (1) followed.

Ramessuri Dassee v. *Doorgadass Chatterjee* (2) referred to.

IN this case a decree in favour of Sadheo Pandey was passed against Ghasiram Gyawal on 18th of August 1888, execution of which was applied for on 17th March 1891, by the issue of a warrant of arrest against the person of the judgment-debtor. A warrant was issued, but was returned unserved, and nothing further being done, the execution proceedings were struck off for default on 17th April 1891.

Another application for execution was made on 7th April 1892, when the decree-holder applied for attachment and sale of an elephant: this application was granted, and the sale was fixed for the 4th June 1892. On the 3rd June the judgment-debtor filed a petition objecting to the proceedings in execution, on the ground that no notice had been served on him in accordance with s. 248 of the Civil Procedure Code, although more than a year had elapsed since the date of the order in the previous application for execution.

* Appeal from Order No. 370 of 1892 against the order of A. C. Brett, Esq., District Judge of Gaya, dated the 26th of July 1892, reversing the order of Babu Gopee Nath Mattay, Subordinate Judge of that district, dated the 4th of June 1892.

(1) I. L. R., 3 All., 424. (2) I. L. R., 6 Calc., 103.

1893

SAHDEO PANDEY v. GHASIRAM GYAWAL.

The Subordinate Judge overruled this objection and allowed the sale to proceed, and on 6th June the elephant was sold, and purchased by Palakdhari Singh.

On an appeal, to which the purchaser (as well as the decree-holder) was made a party, the Judge observed :—

"In the case of *Imamunnissa Bibi* v. *Liakat Husain* (1), it is strongly held that when a notice under s. 240 of the Civil Procedure Code was necessary, but had been neglected, the condition precedent to the issue of a warrant for execution did not exist, and that all the proceedings were void *ab initio*. In that case the auction-purchaser was a third party. The learned Judges refer to the case of *Ramessuri Dassee* v. *Doorgadass Chatterjee* (2), in which the auction-purchaser was the decree-holder. But I do not think this makes any difference. It is true that in the Calcutta case a hint is intimated of doubt as to what would be the decision if the interest of a third party were affected by the settting aside of the sale, but the Allahabad Court set aside the sale, though a third party was the purchaser. I am unable to see how any other decision could be arrived at. If the proceedings are void, the sale is void, and so is the purchase. At the most it is a question of which of two innocent persons suffer. Clearly the one whose property has been wrongly sold is not the one to select; and the 'suffering' of the other is only a disappointment, not an actual loss of what he had."

The Judge accordingly reversed the decision of the Lower Court and set aside the sale.

The decree-holder and auction-purchaser appealed to the High Court, mainly on the grounds that "the fact of no notice having been issued under s. 248 of the Civil Procedure Code did not under the circumstances of this case vitiate the execution proceedings and render the sale which has taken place a nullity, especially when the purchaser at auction is a third party; that the want of such notice did not prejudice the judgment-debtor, inasmuch as he was fully aware of the execution proceedings;" that the property being moveable property, the sale ought not to have been set aside, and that "the precedent of the Allahabad High Court relates to the sale of immoveable property, and the decision of the Calcutta High Court referred to makes a reservation in favour of an auction-purchaser who is a third party."

Babu *Kali Kishen Sen* for the appellants.

Babu *Abinash Chunder Banerjee* for the respondents.

(1) I. L. R., 3 All., 424. (2) I. L. R., 6 Calc., 103.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

This appeal arises out of an application made by the decree-holder on the 7th April 1892 for the purpose of executing a decree dated the 18th August 1888.

It appears that a previous application had been made by him for the same purpose on the 17th March 1891, upon which application an order was passed for a warrant of arrest against the judgment-debtor; but nothing further was done, and eventually the proceedings were struck off on the 17th April 1891. We may take it therefore that the last application by the decree-holder, and the last order that was made by the Court against the judgment-debtor, was on the 17th March 1891, and it follows that in accordance with the provisions of section 248 of the Civil Procedure Code it was necessary to issue a notice calling upon the judgment-debtor to show cause why the decree should not be executed against him, before further proceedings could be taken upon the present application of the decree-holder, which, as already mentioned, was presented on the 7th April 1892.

It appears, however, that no such notice was issued upon this application being made, and certain moveable property belonging to the judgment-debtor was attached, and was advertised for sale on the 4th June 1892. On the 3rd June the judgment-debtor presented an application to the Court, stating that he had received no information before that date of the application by the decree-holder for executing the decree, and that the whole of the proceedings taken by him upon that application were entirely bad by reason of no notice having been issued upon him in terms of section 248 of the Code. This objection, however, found no favour with the Court of first instance, and the Munsif on the 3rd June 1892 rejected it. This was followed by the sale of the moveable property that had been advertised for sale; and at this sale, which took place on the 6th June 1892, a third party by name Palakdhari Singh became the purchaser.

The learned District Judge, upon appeal by the judgment-debtor against the order of the Munsif of the 3rd June 1892, has held, following two cases, one of the Allahabad High Court, and the other

1893

SAHDEO PANDEY v. GHASIRAM GYAWAL.

of the Calcutta High Court, that the whole of the proceedings taken by the decree-holder, commencing with the application of the 7th April 1892, are altogether bad, and therefore they ought to be set aside, inclusive of the sale of the 6th June, at which Palakdhari Singh became the purchaser.

The present appeal is by the decree-holder and the purchaser against the said order of the District Judge.

We must confess that the question raised upon the judgment of the District Judge is not altogether free from difficulty; but after due consideration, we are inclined to agree with him in holding that the whole of the proceedings taken by the decree-holder upon his application of the 7th April 1892 are altogether bad. It seems to us that in cases falling within section 248 of the Code, the issue of a notice under that section is a condition precedent to the issue of a warrant for execution of the decree. This was the view that was adopted in *Imamunnissa Bibi* v. *Liakat Husain* (1), and we observe that this Court also has in the case of *Ramessuri Dassee* v. *Doorgadass Chatterjee* (2) taken the same view. No doubt in the Calcutta case, as it was pointed out by the learned vakil for the appellant, the purchaser was the decree-holder himself, and not a third party; but as regards the question whether proceedings taken by a decree-holder, without notice being issued to the judgment-debtor under section 248 (where such notice is required), are bad in law, the principle of that case is applicable to the present case. That being so, it seems to us that the order made by the Court on the 7th April 1892 for attachment of the moveable property, and the subsequent order for sale, were of no effect whatsoever so as to bind the judgment-debtor. These orders were made in his absence, and could not therefore have any efficacy. No doubt, the sale took place after the petition of objection on the part of the judgment-debtor had been rejected on the 3rd June 1892, and before that order was set aside in appeal; but the purchaser Palakdhari Singh made his purchase with full notice of what the objection of the judgment-debtor was, and he must therefore be taken to have purchased subject to the result of the appeal. And as we are of opinion that the whole of the proceedings, commencing with

(1) I. L. R., 3 All., 424. (2) I. L. R., 6 Calc., 103.

1893

SAHDEO PANDEY v. GHASIRAM GYAWAL.

the application of the 7th April 1892, are altogether bad by reason of no notice under section 248 having been issued upon the judgment-debtor, and the judgment-debtor having had no opportunity to show cause why the decree should not be executed, it seems to us that the sale at which Pulakdhari purchased the property cannot be sustained. The matter that has been complained of in this case is not one of irregularity but one of illegality, if we may say so, and if the whole of the proceedings were altogether bad and ineffectual so as to bind the judgment-debtor, it is obvious that anything done by the Court in the course of the execution that was taken out against the judgment-debtor must fall through.

Upon these grounds, we are of opinion that the order of the lower Appellate Court ought to be sustained, and we dismiss this appeal with costs.

Appeal dismissed.

J. V. W.

Before Mr. Justice Rampini and Mr. Justice Gordon.

1893 *June 22.*

GOBIND PERSHAD *alias* GOBIND LAL (ONE OF THE DECREE-HOLDERS) *v.* RUNG LAL (JUDGMENT-DEBTOR).*

Limitation Act (XV of 1877), sch. II, art. 179 (4)—Application by decree-holder for rejection of petition of judgment-debtor objecting to sale, and for confirmation of sale—Step in aid of execution.

An application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed, is an application falling within the meaning of art. 179 (4) of schedule II of the Limitation Act XV of 1877. An application for execution of the decree made within three years from such a former application is not barred.

Kewal Ram v. *Khadim Husain* (1) followed.

THIS was an application for execution of a decree dated 30th August 1882. Various applications for execution, all within time (though all were struck off), were made thereafter until 2nd July 1888. On that date a further application for execution was made,

* Appeal from Order No. 310 of 1892, against the order of J. Tweedie, Esq., District Judge of Patna, dated the 14th of May 1892, reversing the order of Babu Gobinda Chunder Bysack, Munsif of Behar, dated the 5th of February 1892.

(1) I. L. R., 5 All., 576.

1893

GOBIND PERSHAD v. RUNG LAL.

and on 10th September 1888 the judgment-debtor filed a petition of objection to the execution of the decree, on the ground that it was barred by limitation. On the 24th of September 1888 the Munsif held that the application for execution was not barred, and made an order for execution to proceed, and for the sale of the judgment-debtor's property. The sale accordingly took place, and, notwithstanding an application to set it aside made by the judgment-debtor, it was confirmed by the Munsif on 26th November 1888. On the 29th November an application was made by the judgment-debtor for review of the judgment of 26th November; this application was opposed by the decree-holder, but was granted, the order of the 26th November being set aside, and the 16th February fixed for further hearing of the case. On the 28th January 1889 the decree-holder put in a petition, praying that the application of the judgment-debtor to set aside the sale might be rejected, and the sale be confirmed: the prayer of this petition was, however, rejected, and the sale was eventually set aside.

The present application for execution was made on 17th September 1891, when the judgment-debtor again objected that the execution was barred by limitation.

The Munsif was of opinion, referring to the cases of *Lalraddi Mullick* v. *Kala Chand Bera* (1), *Vellaya* v. *Jaganatha* (2), and *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (3), that the application was not barred, and allowed execution to proceed; but this decision was on appeal reversed by the Judge, who relying on the case of *Raghunandun Pershad* v. *Bhugoo Lall* (4), held that execution of the decree was barred.

From this decision the decree-holder appealed to the High Court.

Babu *Nil Madhab Bose* for the appellant.

Babu *Jogesh Chunder Roy* for the respondent.

The judgment of the Court (RAMPINI and GORDON, JJ.) was as follows:—

The question raised in this appeal is whether an application for execution of a decree is barred by limitation.

(1) I. L. R., 15 Calc., 363.
(2) I. L. R., 7 Mad., 307.
(3) I. L. R., 17 Calc., 53.
(4) I. L. R., 17 Calc., 268.

The first Court holds that the application is not barred, and cites certain authorities in support of its judgment.

On appeal the District Judge has set aside the order of the first Court, being of opinion that the application is barred, and he relies on the case of *Raghunandun Pershad* v. *Bhugoo Lall* (1).

In second appeal it is contended that the District Judge is wrong and that the Munsif is right.

The present application for execution was made on the 17th of September 1891, and a previous application for execution was made on the 2nd of July 1888. *Primâ facie*, therefore, the application of the 17th of September 1891 is barred. It appears, however, that the following proceedings were taken in connection with the application of the 2nd of July 1888. The judgment-debtor objected to the execution of the decree, as being barred by limitation, on the 10th of September 1888; and on the 24th of that month the Munsif held that the application was not barred, and on the same date he passed an order for the sale of the judgment-debtor's property in execution of the decree. The property was accordingly sold.

Thereafter the judgment-debtor applied to set aside the sale; and on the 26th of November 1888 his objections were rejected and the sale was confirmed.

The judgment-debtor then applied on the 29th November 1888 for a review of the order confirming the sale, and notice was duly issued upon the decree-holder. He appeared and unsuccessfully opposed the application for review, which was granted. Subsequently, on the 28th January 1889, the decree-holder put in an application, praying that the judgment-debtor's application to set aside the sale might be rejected, at the same time applying for confirmation of the sale. His application was, however, refused, and the sale was set aside.

It is now contended before us, with reference to the application of the 28th January 1889, that that application was in effect an application to the Court by the decree-holder to take some steps in aid of the execution of his decree; and if that be so, the present application is in time. We think on the authority of the decision

(1) I. L. R., 17 Calc., 268.

1893

GOBIND PERSHAD v. RUNG LAL.

in the case of *Kewal Ram* v. *Khadim Husain* (1) that that application was an application to take some steps in aid of execution, and was therefore sufficient to avoid the bar of limitation. We concur in the view taken by the learned Judges who decided that case, that an application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed (which the application of the 28th January 1889 in fact is), is an application falling within the meaning of art. 179 (4), schedule II of Act XV of 1877. The learned District Judge relies on the decision of this Court in *Raghunandun Pershad* v. *Bhugoo Lal* (2), which, however, we think is not applicable to the present case.

We observe that the appeal before the District Judge was argued *ex parte*, and apparently the application of the 28th January 1889 was not brought to his notice.

In this view of the case, we set aside the order of the District Judge, and restore that of the Munsif with costs.

Appeal allowed.

J. V. W.

Before Mr. Justice Rampini and Mr. Justice Gordon.

1893 *June* 29.

LALLA TIRHINI SAHAI (JUDGMENT-DEBTOR) *v.* LALLA HURRUK NARAIN (DECREE-HOLDER).*

Transfer of Property Act (IV of 1882), *ss.* 88, 90—*Decree not satisfied after sale of mortgaged property—Procedure necessary to obtain balance of decree.*

Where a decree-holder has obtained a decree under section 88 of the Transfer of Property Act, and on sale of the mortgaged property the proceeds of sale are insufficient to satisfy the decree, he must, unless the decree gives him the right to proceed against other property or against the person of his judgment-debtor, apply under section 90 of the Act for a decree for the balance remaining unsatisfied.

* Appeal from Order No. 324 of 1892, against the order of A. C. Brett, Esq., District Judge of Gaya, dated the 29th of July 1892, affirming the order of Moulvi Hamiduddin, Munsif of Gaya, dated the 18th of June 1892.

(1) I. L. R., 5 All., 576. (2) I. L. R., 17 Calc., 263.

IN this case the decree-holder (the plaintiff in a suit on a mortgage bond) had obtained a decree, dated 1st June 1885, for Rs. 433 in the following terms :—

"That the defendant do pay to the plaintiff the decretal money with interest at the rate of 6 per cent. per annum for the period of pendency of the suit, and further interest till the day of realization ; that should the decretal money be not paid within six months, the mortgaged property be duly sold at auction for the realization of the decretal money due to the plaintiff ; that the costs of the defendant be considered as lost ; and that the defendant do pay to the plaintiff Rs. 433, the amount decreed, together with Rs. 57-11-6, the plaintiff's costs in this suit, with interest at the rate of 6 per cent. per annum till realization."

On default of payment the decree-holder executed this decree, and under it in execution the mortgaged property was sold, but did not realize sufficient to satisfy the decree. The decree-holder then applied for execution of his decree against property other than that mortgaged for the balance remaining due under it.

The Munsif allowed execution to proceed, overruling the objection of the judgment-debtor that the decree could not be further executed, inasmuch as no permission to do so had been obtained by the decree-holder under section 90 of the Transfer of Property Act ; and an appeal to the District Judge from this decision was dismissed. The judgment-debtor then appealed to the High Court on the ground (among others) that "the decree-holder could not follow any property of the judgment-debtor other than that mortgaged without permission under section 90 of the Transfer of Property Act, which was admittedly not obtained.

Moulvi *Mahomed Habibulla* for the appellant.

Babu *Mahabir Sahae* for the respondent.

The judgment of the Court (RAMPINI and GORDON, JJ.) was as follows :—

In this case the respondent obtained a decree upon a mortgage bond for the sum of Rs. 433, for costs, and for the sale of the mortgaged property. He then proceeded to sell the mortgaged property, and the proceeds of that sale were insufficient to satisfy his decree. He next applied to be allowed to execute his decree for the balance of the decretal amount, but he did not make any application under section 90 of the Transfer of Property Act.

1893

LALLA TIRHINI SAHAI v. LALLA HURRUK NARAIN.

The Lower Courts have held that it was not necessary for the respondent to make such an application; and the judgment-debtor now appeals to this Court, and contends that it was not open to the respondent in this case to execute his decree further against other property of the judgment-debtor, it not being a decree under the provisions of section 90 of Act IV of 1882.

We think that there is no doubt that the contention of the appellant is correct. The terms of the decree which the respondent has obtained is substantially one under the provisions of section 88 of the Transfer of Property Act, and it merely gave the respondent a right to sell the mortgaged property and to satisfy his decree from the proceeds, but did not expressly give him any right against other property or the person of the judgment-debtor. We think, in these circumstances, that it was necessary for him to apply under section 90 for a decree for the balance. We may refer in this connection to the case of *Sonatan Shah* v. *Ali Newaz Khan* (1), in which it was held that such an order should be applied for. We may also refer to *Batak Nath* v. *Pitambar Das* (2), in which it was held that it was not necessary for the decree-holder in that case to obtain a separate decree under section 90 of the Transfer of Property Act, because the decree which he had obtained expressly provided that, should the mortgaged property not realize sufficient to satisfy the amount decreed, other property of the judgment-debtor should be liable. Now, in the present case it is quite clear that the decree which the respondent has obtained contains no such express provision. In these circumstances we think that the contention of the appellant in this case must prevail.

We therefore decree this appeal with costs.

Appeal allowed.

J. V. W.

(1) I. L. R., 16 Calc., 423. (2) I. L. R., 13 All., 360.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

RAM CHANDRA DAS, ONE OF THE SECOND PARTY (PETITIONER), *v.* MONOHUR ROY AND OTHERS, FIRST PARTY (OPPOSITE PARTIES).*

1893 *April*, 14.

Criminal Procedure Code (Act X of 1882), s. 145—"Parties concerned"—Witnesses—Issue of summons to witnesses—Magistrate, duty of—Process to enforce attendance of witnesses.

THE words "parties concerned" in s. 145 of the Criminal Procedure Code do not necessarily mean only the persons who are disputing, but include also persons who are interested in, or claiming a right to, the property in dispute.

Though in a proceeding under s. 145, the evidence is to be recorded as in a summons case, it is the duty of the Magistrate to issue processes for the attendance of such witnesses as the parties may desire to call, unless he can show good reasons for not doing so.

Hurendro Narain Singh Chowdhry v. *Bhobani Prea Baruani* (1) followed.

OF these cases, one (Rule 111) was a dispute as to the possession of certain land, which led to an order under section 145 of the Criminal Procedure Code, and the other (Rule 109) was a case of unlawful assembly, assault and theft, arising out of the dispute as to the land. The facts of the case under section 145 of the Criminal Procedure Code are alone material to this report.

The dispute was concerning a chur which had been gradually formed on the western bank of the river Ganges, which one party alleged was a portion of chur Kristodebpur (bearing *touji* No. 151 in the Burdwan Collectorate), of which they alleged they had been in possession for a long time past; the other party contending that the disputed chur was in the possession of, and belonged to, Grija Nath Roy Chowdhry and Jatindra Nath Ray Chowdhry, zamindars of Satkira, the Digapaty Raj estate under the Court of

* Criminal Revision Nos. 109 and 111 of 1893 against the order passed by J. Kelleher, Esq., Sessions Judge of Burdwan, dated the 20th of January 1893, modifying the order passed by Babu Nogendra Nath Pal Chowdhuri, Deputy Magistrate of Kalna, dated the 7th of January 1893.

(1) I. L. R., 11 Calc., 762.

1893

RAM CHANDRA DAS v. MONOHUR ROY.

Wards, and one Ram Das Gangooly of Santipore, who were the owners of mauzas Panpara and Gyaspur (appertaining to *towji* No. 508 in the Jessore Collectorate) on the opposite side of the river: the allegations of the second party being that the chur was formed by the re-formation on the other side of the river of portions of the two mauzas of Panpara and Gyaspur, which had been diluviated by the river.

The head constable of the Kulna police station having reported that the dispute was likely to occasion a breach of the peace, the Deputy Magistrate instituted proceedings under section 145 of the Code, and had notices served on Monohur Roy, Kali Das Hazra, gomasta of Koondun Lall Karpur, and Goberdhone Sheik, a tenant of the chur, as the first party; and on Ram Chandra Das, Brojo Nath Ghose, gomasta of the Panpara zamindars, and Kali Charan Singh, a lathial in their employ, as the second party, to put in their claims as to the fact of possession.

An application was made on 14th December 1892 by the second party for summonses for thirty-four witnesses whom they wished to appear and give or produce evidence in support of their case; but the Deputy Magistrate ordered the issue of summons only on five of such witnesses; and only four witnesses were examined for the second party. On their witnesses not attending without summons, the Magistrate refused to postpone the case for their attendance. Several preliminary objections were taken to the proceedings by the pleader for the second party, but the judgment of the Magistrate in one of them only is material to the present report. He said :—

"Another preliminary objection was that as the zamindars of Panpara, the Digapaty estate under the Court of Wards, and the Satkira estate under the Court of Wards, under whom the gomastas Ram Chunder and Brojo Nath of the second party serve, having not been made a party, the proceeding cannot be valid. But to this I must say that no breach of the peace is expected from a manager under the Court of Wards who cannot be a party to such high-handed and illegal means, and I doubt very much if they were actually aware of the proceedings of those underlings, the gomastas under a zamindar. This I say, as I don't find any proof or sign throughout the proceedings that the said managers in any way are taking any interest in this case, and, therefore, it would be quite useless to drag them here in an undesirable proceeding of a Criminal Court. Then, as regards the evidence

of actual possession, that adduced for the first party, I cannot but say, is overwhelming; whereas for the second party, I may say, almost nil. *Jamabandis, pattas*, &c., of many years back were filed for the first party and not a bit of paper for the other."

Eventually the Deputy Magistrate found the first party in possession of the disputed chur.

On the application of the second party, a rule (No. 111) was granted to show cause why this order should not be set aside. A rule (No. 109) was also granted in the case of unlawful assembly and theft, but that is not material to this report.

The petition on which the rule was granted stated that the persons whom the second party were desirous of having called as witnesses on their behalf were all of them material witnesses, some of them being the zamindars' managers and officers under the Court of Wards, having the custody of the zamindari papers and documents relating to the lands of the disputed chur; and the rest being ryots of the said chur and respectable inhabitants of adjoining places.

The material portion of the prayer of the petition was "that in the absence of the owners or proprietors having, or claiming to have, an interest in, or possession over, the subject matter in dispute, no order under section 145 of the Criminal Procedure Code can be passed, and that the order of the Lower Court is bad in law, and as such ought to be set aside; that the second party being admitted to be mere servants, and having, or pretending to have, no claim, right, or possession of their own over the said lands, cannot be made parties to a proceeding under section 145 of the Criminal Procedure Code, and that the orders under sections 144 and 145 of the said Code cannot be made in a proceeding against them, and the proceedings of the Lower Court being irregular and illegal, ought to be set aside; and that the Lower Court ought to have allowed the applications of the second party for summons on all their witnesses, and to have granted the postponement as applied for by them, to enable them to procure the attendance of their witnesses, and that the second party have been materially prejudiced by the Lower Court's orders on the said applications."

Mr. *Pugh* and Babu *Surendra Nath Motilal* in support of the rule.

1893

RAM CHANDRA DAS v. MONOHUR ROY.

Babu *Dwarkanath Chuckerbutty* showed cause

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

We have heard together these two rules—one granted to show cause why an order under section 145, Criminal Procedure Code, should not be set aside, and the other referring to the conviction of three men under sections 143 and 379 of the Penal Code. The charge was in respect of theft of crops on a portion of the land which was in dispute in the 145 section case, and so far as the question of possession of the crops said to have been looted is concerned, it follows that the case is connected to some extent with the section 145 proceedings. The rule was granted on several grounds, but after hearing the learned Counsel in support of it, we thought that so far as the section 145 proceedings are concerned there are only two grounds which we have to consider, and we think that on both those grounds the application must be successful. The first ground is this. It is said that the persons before the court in the 145 proceedings did not include all persons who were concerned in the dispute, and that the real owners of the land adjoining who claimed this land were not parties to the proceedings, the parties being their servants. Now, under section 145, a Magistrate is bound to require "the parties concerned" in the dispute to attend his court. The words "parties concerned" do not, we think, necessarily mean only the persons who are disputing They include persons who are interested in the dispute, persons who claim a right to the property which is in dispute. That, we think, is clear, because if only the persons who are disputing were to be made parties it might turn out that the Court would be unable on their evidence to come to any conclusion, and would make an order under section 146, which would have a distinctly prejudicial effect on a person who may have a real claim to the land and may be in possession and yet may not be disputing or committing any act likely to cause a breach of the peace. We think the construction that the words "parties concerned" in section 145 include persons who are interested in, or claiming a right to the property, is the reasonable construction, and that it is the duty of the Magistrate, on the materials before him, to ascertain, so far as he can, who

are the persons interested in or claiming a right to the property in dispute, and to give notice to them all so that the whole matter, so far as his court is concerned, may be disposed of in one proceeding. On that point we think the applicant must succeed, and that the Magistrate was wrong in not doing what we think the law required him to do.

There is another ground upon which we think the order must be set aside, and that is this. It appears that an application was made to the Magistrate to subpœna a number of witnesses whom the second party wished to be examined, but that the application was refused. Our attention has been called to a case of *Hurendro Narain Singh Chowdhry* v. *Bhobani Prea Baruani* (1) decided by Prinsep and Grant, JJ., who considered that in a section 145 proceeding, although it is a case in which the evidence is to be recorded as a summons case, it is the duty of the Magistrate to issue such processes unless he shows good reasons to the contrary. Here the application was made seven days before the case of the second party began. There was, therefore, ample time apparently to serve the processes upon some of the witnesses. At any rate, it is impossible to say that this application for process was made for the purpose of delay, and we think the second party was entitled to have a chance of having their witnesses in court. On these two grounds we think that the order is bad and must be set aside.

The question then that remains is whether we ought to direct a fresh trial setting aside these proceedings from the beginning, or allow these proceedings to continue. We think in this case it would be better to set the whole proceeding aside. The primary object of section 145 is the preservation of peace in the district. If, at the present moment, there is any likelihood of the peace being broken, it is competent to the Magistrate to institute fresh proceedings under the section. If, as a matter of fact, there is no prospect of the peace being disturbed, there seems to be no necessity why these proceedings, which have been going on for some time, should continue. We therefore set aside the order and proceedings under section 145.

(Their Lordships then considered Rule 109, and in that case eventually set aside the conviction and ordered a new trial.)

J.V.W. *Rules made absolute.*

(1) I. L. R., 11 Calc., 762.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *May* 12.

JADUB LALL SHAW CHOWDHRY (PETITIONER) *v.* MADHUB LALL SHAW CHOWDHRY AND OTHERS (JUDGMENT-DEBTORS).*

Transfer of Property Act (IV of 1882), *ss. 99 and 67—Sale of mortgaged property in execution of money-decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.*

A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. Section 99 of the Transfer of Property Act limits the right of a decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act.

Quære whether the suit to be instituted under s. 99 is a suit on the mortgage or is one on the charge created by attachment.

THE facts of this case were as follows:—Jadub Lall Shaw Chowdhry brought a suit, No. 482 of 1891, on the Original Side of the High Court against the four defendants, and obtained a decree against them. The decree was sent to Mymensingh for execution, as the defendants' property was situated there, and on 20th February 1892 the plaintiff put in a petition, stating that he would file a list of the defendants' properties, as he did not then know what they were, and prayed for an order to issue against the judgment-debtors, and that, after he had filed a list of the properties, the entire amount of the decretal money, together with interest and costs of the execution, might be realized by attachment and sale of those properties, &c. On 23rd of February 1892 an order was issued on the judgment-debtors to show cause why execution should not be granted. An attachment order was issued on 22nd March 1892. On 9th April a sale proclamation was issued, fixing 20th May 1892 for the sale of the attached properties. All these properties had been mortgaged by the judgment-debtors to

* Appeal from Original Order No. 410 of 1892, against the order of Babu Radha Krishno Sen, Subordinate Judge of Mymensingh, dated the 24th of October 1892.

the decree-holder on 5th March 1889 for Rs. 90,000. On 20th May 1892, at the instance of the decree-holder, the sale was postponed till 28th May. On 28th May, at instance of decree-holder, fresh proclamation was issued for 20th July 1892. One Koylas Chunder Raot brought a suit against these very defendants and the above properties were again attached by the said Koylash Chunder Raot, and on the 20th July an injunction was granted in this suit (Original Suit No. $\frac{24}{31}$ of 1892) staying execution of the former decree, the sale was stopped till further orders, and the case was struck off. The decree holder in the first suit, by appealing to the High Court, had the injunction set aside, and on the 8th September 1892 again prayed for execution of this original decree. The 24th October 1892 was fixed for the sale. On the 24th October 1892 the judgment-debtors put in a petition, objecting to the sale on the ground that, as the properties attached had been mortgaged by them to the decree-holder, his only remedy was to bring a suit for the sale of those properties under s. 67 of the Transfer of Property Act, and quoted s. 99 in support of their objection. The Subordinate Judge allowed the objection, and the case was struck off the file. From this decision the decree-holder appealed to the High Court.

The *Advocate-General* (Sir *Charles Paul*), Dr. *Rashbehari Ghose*, Babu *Jogesh Chunder Roy*, and Babu *Madava Nand Bysack* for the appellant.

Mr. *Pugh*, Babu *Saroda Churn Mitter*, and Babu *Harendra Narain Mitter* for the respondents.

The arguments considered by the Court for the purpose of this report are set out in the judgment.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The only question that arises in this case is whether a person who holds the mortgage of any property can sell that property in execution of an ordinary money decree in satisfaction of a claim not arising under the mortgage. The Court below has answered the question in the negative, holding that s. 99 of the Transfer of Property Act limits the rights of the decree-holder in such a case, and provides that he shall not bring the mortgaged property

1893

JADUB LALL SHAW CHOWDHRY v. MADHUB LALL SHAW CHOWDHRY.

to sale otherwise than by instituting a suit under s. 67 of that Act. It is now contended before us in appeal on behalf of the decree-holder that the order of the Court below is wrong, and that s. 99 of the Transfer of Property Act, though apparently very general in its terms, must receive a limited construction, as otherwise anomalies and injustice would result such as the Legislature could never have intended.

It is argued that the application of s. 99 should be limited to those cases where the decree sought to be executed by the mortgagee is based on a claim which arises under, or is connected with, the mortgage; and the concluding portion of the section is referred to in support of this view, and it is urged that s. 43 of the Code of Civil Procedure, from the operation of which the suit required to be instituted under s. 67 of the Transfer of Property Act is excepted, can have no application to such a suit, unless the claim on which the decree is based arises out of, or is connected with, the mortgage. This argument assumes that the suit required to be instituted under s. 67 is a suit on the mortgage held by the decree-holder. We shall suppose that this assumption is correct, and examine the soundness of the argument on that supposition.

We do not think that the concluding words of s. 99 can be taken as indicating any limitation of the scope of the section in the manner contended for, when the section is made expressly applicable to decrees for the satisfaction of "*any claim, whether arising under the mortgage or not.*" The concluding portion of the section is intended to except the suit required to be instituted from the operation of s. 43 of the Code of Civil Procedure only in those cases where the last-mentioned section would apply, that is, upon the assumption in the appellant's argument, in cases in which the decree is based on a claim arising under the mortgage. The construction contended for on behalf of the appellant is opposed to the plain meaning of the words of the section quoted above.

Nor are the anomaly and the injustice which it is said would result from the natural construction of the section such as would justify us in putting a forced construction upon it. It has been contended (assuming the suit required by s. 99 to be one on the mortgage) that the decree-holder may not be in a position to institute any suit under s. 67 for years to come, by reason of the

mortgage not falling due; and if the debtor has no other property except that covered by the mortgage, it would be unjust to the decree-holder to prevent him from realizing his just dues, when such realization by the sale of the mortgagor's equity of redemption with him being proclaimed can lead to no harm to any one. One answer to this argument would be this: that the injustice complained of must be confined to a limited class of cases, namely those in which the decree is based upon claims arising from tort, as in cases where it is based upon claims arising from contract, the party who seeks to enforce the claim can always protect himself when entering into the contract. On the other hand, the object intended to be secured by s. 99 appears to be that mortgaged property should not be allowed to be brought to sale by the mortgagee in execution of any money decree held by him, except by a suit under s. 67, to which every other encumbrancer must under s. 85 be a party, and the sale that may be ordered will be free of his encumbrances, and will thus fetch fair value, and will not be likely to be followed by the embarrassing litigation which not unfrequently forms the sequel of the sale of an equity of redemption.

We have hitherto accepted as correct the assumption in the appellant's argument that the suit required by s. 99 to be instituted under s. 67 is a suit on the mortgage.

The language of s. 99 is, however, not very clear, and it was suggested by the learned Counsel for the respondents that the suit therein required to be instituted may be a suit based on the charge created in favour of the decree-holder by the attachment, s. 100 making provisions relating to mortgagee's instituting suits applicable to persons having a charge. If this view is correct, the argument based upon the reference to s. 43 of the Code of Civil Procedure and upon the injustice of delaying decree-holders will lose all its force. But it is not easy to see what object would be gained by such a suit, when the sale to be ordered by it cannot without the consent of the mortgagee, when the mortgage is of a prior date, be free of the mortgage (see s. 99 of the Transfer of Property Act).

It is not necessary, however, to decide in this case whether the suit required to be instituted by s. 99 is a suit on the mortgage, or is one on the charge created by attachment. Neither the one suit nor the other was brought by the present decree-holder.

1893

JADUB LALL SHAW CHOWDHRY v. MADHUB LALL SHAW CHOWDHRY.

The case of *Devendra Nath Sanyal* v. *Chandra Kishore Munshi* (1) cited for the appellant, is clearly distinguishable from the present one, as that was a case in which the decree sought to be executed was passed before the Transfer of Property Act came into operation, and was a decree authorizing the sale of the mortgaged property and not a mere money decree, such as is sought to be enforced in this case.

For the foregoing reasons, the construction put by the Court below on s. 99 is, in our opinion, correct, and this appeal must accordingly be dismissed with costs.

Appeal dismissed.

C. S.

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

1893 *August* 12.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* NITYE SINGH AND ANOTHER (PLAINTIFFS).

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* BAIKUNT NATH PRODHAN (PLAINTIFF).

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* RAM TARUCK DAS (PLAINTIFF).*

Bengal Tenancy Act (VIII of 1885), ss. 101, 102—Power of Settlement Officer—Proceedings in preparation of record of rights—Decision as to validity of lakhiraj titles—Power of Revenue Officer to declare land claimed as lakhiraj liable to rent.

Held by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.):—In preparing a record of rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the

* Full Bench reference in appeals from Appellate decrees 538, 539 and 540 of 1891 against the decrees of J. Pratt, Esq., District Judge of zilla Midnapur, dated the 29th of December 1890, reversing the decrees of Babu Chunder Shekhur Kur, Settlement Officer of Tamluk, dated respectively the 25th, 20th and 29th of March 1890.

(1) I. L. R., 12 Calc., 436.

area under inquiry, so as to resume such lands and to declare them liable to settlement of rent.

Gokhul Sahu v. *Jodu Nundun Roy* (1) referred to.

THESE cases were referred to a Full Bench by Prinsep and Hill, JJ., on 28th July 1892, with the following opinion:—

"These three second appeals relate to certain proceedings taken by the Settlement Officer of Tamluk within the district of Midnapore, under Chapter X of the Bengal Tenancy Act, in which he has found that a greater portion of the lands hold by the respondents are held under invalid *lakhiraj* titles, and are, therefore, subject to payment of rent.

"We have not been shown any order under Section 101 of the Bengal Tenancy Act under which the proceedings originated, but we are informed that the Revenue Officer is acting under Section 101, Clause 2 (*d*). It appears from the record that the Government has purchased the estate and that it is in this interest that the proceedings have been taken.

"These orders have in appeal been set aside by the District Judge on the ground that when the Settlement Officer 'found an unrebutted claim to hold the lands as rent-free was put forth and was apparently *bonâ fide*, he should not have assumed the functions of a Resumption Court,' and also because 'the *onus* was on Government and not on the respondents, and that it has not been discharged because undoubtedly the respondents have never paid rent for these lands.' In one case (appeal No. 538) there was found an uninterrupted possession for more than 40 years, while in others it would seem that possession was for much longer periods.

"The Government in the name of the Secretary of State in Council has appealed against this decree, maintaining under the authority of the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1) that the Settlement Officer was competent to consider the validity of the *lakhiraj* titles set up, and that the correctness of the findings of fact arrived at by that officer has not been considered.

"We are inclined to differ from the opinion expressed in this judgment of another Bench regarding the jurisdiction of a Revenue Officer under Chapter X of the Bengal Tenancy Act,

(1) I. L. R., 17 Calc., 721.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

and we accordingly refer for the opinion of a Full Bench the question:—

"Whether in preparing a record-of-rights under Section 102 of the Bengal Tenancy Act, a Revenue Officer is competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry so as to resume such lands and to declare them liable to settlement of rent. Should this be answered in the affirmative, it will then become necessary to determine whether the burden of proof has been properly put on the respondents."

Babu *Hem Chunder Banerjee* for the appellant.

Babu *Bhawani Charan Dutt* for the respondents in No. 538.

Babu *Saroda Charan Mitter* for the respondent in No. 539.

Babu *Srinath Das* and Babu *Saroda Charan Mitter* for the respondent in No. 540.

Babu *Hem Chunder Banerjee* contended that the Legislature had power to order the Settlement Officer to make a record of rights, and to include in such power the decisions of any disputes arising in such proceedings. This they had done in the Tenancy Act, ss. 101, 102. Under the Settlement Regulation of 1822 the Settlement Officer could decide *lakhiraj* titles. Under the Bengal Tenancy Act the proceedings of the Settlement Officer are assimilated to those in a regular civil suit; see the *Calcutta Gazette* of 19th January 1887, Part, I, page 99, and the rules made by the Government under s. 189 of the Act. It is erroneous to suppose that ss. 101 and 102 of the Tenancy Act apply only to cases where the relationship of landlord and tenant is admitted. In the present case the question referred to the Full Bench assumes that no such relationship existed. The principle on which the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1) is decided should govern this case. In that case the Revenue Officer's decision was held to be *res judicata;* in other words he had power to give it.

Babu *Srinath Das* for the respondent, Ram Taruck Das:—A question of title, such as arises in this case, cannot be determined by the Settlement Officer acting under Chapter X of the Bengal

(1) I. L. R., 17 Calc., 721.

Tenancy Act; the only questions he can determine are those between landlord and tenant. Where tenancy is denied, his jurisdiction ceases. All the sections of this chapter refer only to an actual relationship of landlord and tenant: in fact the whole Act only applies to such relationship. For instance, s. 158, for an application under which section it has been held that there must be such actual relationship, tenancy admitted for the purpose of the application is not sufficient: see the Full Bench case of *Debendro Kumar Bandopadhya* v. *Bhupendro Narain Dutt* (1). Section 182 also implies the existence of some "tenant." The case of *Gokhul Sahu* v. *Jodu Nundun Roy* (2) is distinguishable from the present case because in that case the relationship of landlord and tenant was found to exist between the parties, and the learned Judges who decided that case say—"If no relationship of landlord and tenant existed in respect of any particular piece of land, it seems to us to be at least doubtful whether any entry could be recorded regarding it." Here tenancy is denied: see also the cases of *Norendro Nath Roy Chowdhry* v. *Srinath Sandal* (3), and *Bidhu Mukhi Debi* v. *Bhagwan Chunder Roy Chowdhry* (4). [PIGOT, J.:—Were not those cases of disputes between zamindars, the estate of one of whom was under settlement and the other not?] They were cases where a question of title arose and there was no tenancy admitted: tenancy and liability to rent were denied as they are here. The respondent holds adversely to the proprietor, and from a time prior to the permanent settlement. In such a case it is for the proprietor to prove that the land is in his estate and is liable to rent. *Harihar Mukhopadhya* v. *Madhab Chandra* (5). [GHOSE, J:—Was that a suit for rent?] No, it was a suit for resumption. [PIGOT, J:—Do you allege your land is *lakhiraj* in the sense of being revenue-free as well as rent-free?] The word in Bengali translated as "rent-free" means also "revenue-free;" there is no different word for revenue-free land. The argument as to want of jurisdiction in the Settlement Officer in questions of title is confirmed by s. 111 of the Tenancy Act. This and the other sections in Chapter X were taken from Bengal Acts VI of 1862 and VIII of 1869, ss. 37, 38

(1) I. L. R., 19 Calc., 182.
(2) I. L. R., 17 Calc., 721.
(3) I. L. R., 19 Calc., 641.
(4) I. L. R., 19 Calc., 643.
(5) 8 B. L. R., 566 (579): 14 Moo. I. A. 152.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

and 39, and under those Acts it was held in such cases that there was no jurisdiction to decide questions of title. [O'KINEALY, J :—The only corresponding section, so far as I see, is section 103.] The sections are of course modified, but they are substantially the same as those of the old Acts. The Government is auction purchaser of this zamindari; if it had been purchased by a private person, the law would be as I contend, and it is submitted that the fact that Government is the purchaser can make no difference. The District Judge was right in holding that the Settlement Officer had no jurisdiction to decide on these rent-free titles. Under section 111 the Civil Court has to decide any matters. The Settlement Officer has only to record them.

Babu *Hem Chunder Banerjee* in reply:—The respondents were the persons who asked the Settlement Officer to decide the question under section 106. [O'KINEALY, J., referred to Rule 32 of the rules published by the Local Government for guidance of its officers. The Revenue Officer is said to have been acting under section 101, clause (*d*), but that clause refers to cases where a settlement of revenue is being made. Under what Act was the settlement of revenue being made when proceedings were taken under section 101, clause (*d*) ?] The proceedings for settlement were taken only under section 101 of the Tenancy Act. The reference to clause (*d*) must be a mistake: it may have been clause (*c*) referring to estates belonging to Government: the Settlement Officer alone represented the estate. [PIGOT, J :—Then no one appeared to contest the objections before the Settlement Officer? Between whom was the disputed matter decided under section 106?] Between the Secretary of State and the so-called tenants. [PIGOT, J: —But the Settlement Officer himself represented the Secretary of State. PETHERAM, C.J :—It may be that the sections do not apply to cases where the Government is the zamindar because there is no one who can settle the disputes, no one had been specially appointed to do so.] There is a judicial officer, see section 108. [PETHERAM, C.J: —That is afterwards, on appeals from the Revenue Officers' decisions, but in the first place a Revenue Officer has to do it. O'KINEALY, J., referred to section 195 of the Act to show that the powers of Settlement Officers were not affected by the Act.] In this case a man was specially appointed, and it is submitted he had power

to decide these questions of title. The cases of *Norendro Nath Roy Chowdhry* v. *Srinath Sandel* (1), and *Bidhumukhi Dabi* v. *Bhugwan Chunder Roy Chowdhry* (2), are distinguishable: they were cases of boundary disputes, and it might well be that a settlement officer would have no power to decide disputes except as regards lands actually belonging to the estate under settlement.

C. A. V.

PETHERAM, C.J.—My answer to the question referred to the Full Bench is "that a Revenue Officer in preparing a record-of-rights under sections 101 and 102 of the Bengal Tenancy Act is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent."

Section 101 is the section which creates the power, and the power created is to order a survey to be made and a record-of-rights to be prepared, that is to say, to prepare a record of such rights as the officer finds in existence. The words cannot in my opinion bear the meaning that they give the officer the power to create fresh rights, and to record them when he has created them.

The question assumes that the land occupied within the area under inquiry is land which has not been held by the occupier as a tenant within the definition in section 3 of the Act, that is, that the occupier is a person who has occupied the land without paying rent, and not under a special contract with the landlord, which absolves him from the payment of rent, and further assumes that before any rent could be recovered from him the land must be resumed by the landlord and a rent settled upon it by some competent authority. I do not think that an officer whose powers are limited to recording existing rights can have such a power, and for this reason I answer the question in the manner which I have already mentioned.

I have carefully considered the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (3), and see no reason to doubt the correctness of that decision.

The result is that the appeals will be dismissed save as to the order in No. 538, that the land should be recorded as *lakhiraj*, and

(1) I. L. R., 19 Calc., 641. (2) I. L. R., 19 Calc., 643.
(3) I. L. R., 17 Calc., 721.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

in Nos. 539 and 540, that the respondents should be recorded as *maliks*, which was wrong. The appellant must pay the costs in these three appeals.

PRINSEP, J.—The Local Government, by a notification under section 101 of the Bengal Tenancy Act, directed a survey to be made and a record-of-rights to be prepared in respect of all lands included within the boundaries of the Government estate Kamina Chuk, bearing *towji* No. 802 in the district of Midnapur. (*Calcutta Gazette*, 19th January 1887, part I, page 99.)

This notification was apparently not brought to the notice of the Division Bench which has referred these second appeals to a Full Bench, but it has been cited to us in the hearing of this reference.

This estate Kamina Chuk, No. 802 on the *towji*, was, we have been informed, bought by Government in 1868, but not at a sale for arrears of revenue.

The terms of the notification do not set out the grounds on which these proceedings were instituted by express reference to any particular clause of section 101. We may, however, take it that action was taken under section 101 (2) (*c*), the local area being comprised in an estate which belongs to Government. No settlement of revenue could have been contemplated, because the local area was that of a permanently-settled estate.

The Revenue Officer accordingly, under the Survey Act of 1875, proceeded to measure the lands and called upon those holding lands within that estate to point out the boundaries of their holdings, and also, it would seem, to state their titles thereto. No notice is on the record, but we gather that these were the terms of the notices issued from the petitions of objection presented by the respondents in the appeals now before us.

The respondents claimed to have held their lands rent-free or revenue-free for very many years, the exact term being doubtful, but ranging from 40 years to the time of the permanent settlement, and they stated that they have never paid rent at any time. Moreover, there is nothing on the record to show, nor has the Revenue Officer found, that at any time since the permanent settlement rent has been received for any of these lands. And it is not alleged that any of the respondents or their predecessors in title

were put into the possession by any of the zamindars, the proprietors of the estate. The Revenue Officer nevertheless called upon the respondents to prove the titles set up, and having, except in one instance, found them to be bad, he has declared the lands to be liable to assessment of rent.

The Special Judge on appeal set aside these findings, holding that they were without jurisdiction. He has further held that the burden of proof was on Government, and that it has not been discharged.

The Division Bench, before which these second appeals by Government against the order of the Special Judge came, was unable to agree with the view of the law expressed in *Gokhul Sahu* v. *Jodu Nundun Róy* (1), and the Judges consequently referred these appeals to a Full Bench to consider "whether, in preparing a record-of-rights under section 102 of the Bengal Tenancy Act, a Revenue Officer is competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent. Should this be answered in the affirmative, it will then become necessary to determine whether the burden of proof has been properly put on the respondents."

In order to prepare a record-of-rights of the estate Kamina Chuk, it was the duty of the Revenue Officer to record—

1. The name of each tenant.
2. The class to which he belongs.
3. The situation, quantity and boundaries of the lands held by him.
4. The name of the landlord.
5. The rent payable.
6. The mode by which that rent has been fixed, whether by contract, by order of a Court, or otherwise.
7. The special conditions and incidents, if any, of the tenancy.

Consequently the first step was to determine whether the respondents or any of them were tenants within the definition given

(1) I. L. R., 17 Calc., 721.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

in section 3 (3), that is to say, whether they were any of them liable to pay rent for any of the lands held by them.

The burden of proof was on the landlord, the Government, to prove that these persons were liable to pay rent. It may be that the lands held by the respondents form portion of the estate Kamina Chuk, but even then it would not necessarily follow that the respondents are liable to pay rent for them to the Government, the present proprietor of the estate. In these cases the respondents have denied that they were any of them put into possession by any of the proprietors of the estate; they have also denied that they have at any time paid rent for any of these lands; they claim to have held these lands under various titles, rent-free; and, admittedly, they have all so held these lands for very many years. *Primâ facie* the respondents are not liable to pay rent, and it seems equally clear that they cannot be held to be liable to pay rent unless and until they have been declared to be so liable by a regularly constituted Court.

It is the duty of a Revenue Officer in preparing a record of rights under the Bengal Tenancy Act ordinarily to record only the existing state of things. Unless he is specially empowered, he cannot disturb the existing relations between landlord and tenant or between the proprietor of an estate and a person occupying land under a title adverse to him. Such matters are within the jurisdiction of the Civil Courts, and are cognizable only by such Courts unless the law has otherwise specially provided. The law does not give a Revenue Officer such jurisdiction. The respondents are not necessarily the tenants of the Government as proprietor of Kamina Chuk, merely because (and even this has not been found) they may occupy lands within that estate. The Revenue Officer is not competent to determine (1) whether they ought to be tenants, (2) whether they ought to be made liable to pay rent, and (3) lastly to assess that rent.

The Revenue Officer has assumed to himself all these functions without the authority of law.

Our attention has been directed to section 104 (2), and it has been contended that if the lands were *mal* lands within the revenue paying estate Kamina Chuk, the Revenue Officer was competent to investigate the titles set up by the respondents, and on holding

that those titles were not established he was competent to settle or assess rents.

The passage of section 104 (2) which is quoted as applicable to these cases, is that, when either the landlord or tenant applies for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant. Read with the context, this applies only to lands for which rent has been already settled between the parties, a modification or settlement of which rent in the future is desired by one of them. The section proceeds thus—"in settling rents under this section the officer shall presume, until the contrary is proved, that the existing rent is fair and equitable." In the cases before us there is no existing rent, so that this section cannot apply. The whole of Section 104 deals with persons who as tenants are paying rent to the landlord, and it empowers a Revenue Officer, in making a record of rights, to enhance or abate those rents either in consequence of the excess or deficiency of the holding occupied, or because the rent paid is not fair and equitable, or to settle the rent, when a settlement of revenue is being made, so as to determine the revenue payable. But none of these cases is applicable to the present appeals.

Consequently the Revenue Officer was not competent to act as a Resumption Officer and to determine whether the *lakhiraj* titles set up were or were not valid titles. No such power has been expressly given to him by law. On the contrary, there are special laws directing how and by whom such matters should be inquired into and determined. We may also observe that, under the law for the North-Western Provinces, this power has been specially given to Revenue Officers in the preparation of a record of rights; but the Legislature has also simultaneously repealed the Resumption Regulations. In Bengal those regulations are still in force, and such powers have not been so conferred.

At the hearing of these cases we were inclined to express dissatisfaction with the Revenue Officer who has conducted these proceedings and who seemed to have been responsible for the procedure adopted, which was altogether opposed to that recognized by Courts of law and by the Legislature. But while our judgment was still under consideration, our attention was drawn to certain rules forming part of Survey and Settlement Manuals,

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

issued apparently under the authority of the Board of Revenue as directions to their Subordinate Officers when proceeding under the Special Revenue Acts relating to surveys and settlements. It was observed, however, that under this appearance of authority some of the rules were expressly directed to judicial proceedings under Chapter X of the Bengal Tenancy Act, and had been issued as instructions to Revenue Officers holding such proceedings. It did not appear that these rules had received the force of law in the manner prescribed by sections 189, 190 of the Bengal Tenancy Act, or that they were otherwise in any way binding upon Revenue Officers in such proceedings. The learned Government Pleader who had appeared in these cases was accordingly given an opportunity of being heard as to the validity of these rules. The learned Government Pleader has placed before us a letter from the Under-Secretary of the Government of Bengal to the Superintendent and Remembrancer of Legal Affairs, dated 17th June last, to the effect that the rules in the Settlement Manual were passed under the authority of Government by the Board of Revenue. It may be taken that the same course was followed in the passing of similar rules in the Survey Manual. The learned Government Pleader has also informed us that he does not wish to be heard further on this matter.

It therefore becomes my duty to consider on the materials before us how far these rules, so far as they relate to judicial proceedings taken under Chapter X of the Bengal Tenancy Act and have not been passed in the manner directed by Sections 189 and 190 of that Act, have any binding force as directions to Revenue Officers acting as judicial officers under that Chapter or Courts before which such matters may come on appeal.

I have no doubt that all rules in the Survey Manual and Settlement Manual relating to the duties of Revenue Officers making a survey and preparing a record of rights under the authority of section 101 of the Bengal Tenancy Act so far as such officers act as judicial officers, and purporting to be instructions to those officers which have not been passed by Government in the manner prescribed by Sections 189 and 190 of that Act, are altogether without sanction of law and are in no way binding on such officers, and that it is our duty to declare this. They are without legal

authority as rules purporting to be made by Government, because they have not been passed in the manner required by sections 189 and 190 of the Bengal Tenancy Act. They are moreover not binding on Revenue Officers so acting under the Bengal Tenancy Act so far as the rules purport to be under the authority of the Board of Revenue, because that Board is not empowered to make such rules or to issue such rules for the instruction and guidance of Revenue Officers in such matters, such Revenue Officers acting under the Bengal Tenancy Act empowered by that Act to exercise certain judicial functions in the course of which they may pass orders subject to appeal to a Special Judge and ultimately to the High Court.

The Bengal Tenancy Act does not confer authority on the Board of Revenue in such matters, and therefore Revenue Officers, in the performance of duties under that Act, cannot be in any way subject to the control and authority of the Board of Revenue, or be required to observe rules passed by that Board. They are bound to observe the law and such rules as may be regularly passed by Government under sections 189 and 190 of the Act, and also any orders passed judicially on appeal by the Special Judge or the High Court, and they are also bound to follow as precedents the orders passed by the Special Judge and High Court in cases of a similar character. Revenue Officers in such proceedings are subject to no other authority. Consequently in all matters of a judicial nature coming within Chapter X of the Bengal Tenancy, a Revenue Officer is subject to no orders from the Board of Revenue. They are subject to rules made by Government under that Act and to no other rules and to no departmental instructions in relation to matters regarded as judicial and open to appeal to a Special Judge. Amongst the rules published in these Manuals, the rules in Chapter V, Nos. 4, 9 (page 18), Nos. 20, 21 (page 20) of the Settlement Manual, and in Chapter II, Nos. 32, 33, 35 (pages 8, 9), and in Chapter IV, No. 1 (page 12), of the Survey Manual seem to be particularly open to objection in connection with the proceedings in the cases now before us. The want of authority of the rules to which I have referred relates of course to the functions of a judicial character performed by a Revenue Officer under the Bengal Tenancy Act.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

I feel bound to draw attention to the proceedings taken by the Revenue Officer under the mistaken idea that these rules were binding on him, and the grave injustice likely to result from the course taken by him.

We have in these cases a Revenue Officer of Government directed to prepare a record of rights amongst which is the preparation of a rent-roll of a permanently-settled estate which more than 20 years before the proceedings taken had become the property of Government by purchase, that is to say, an officer acting under the instructions of the Chief Revenue authority in Bengal issued with the approval of the Government, itself the proprietor of the estate, investigating and determining the relations between persons whom the Government asserts to be their tenants and the occupier of lands who deny that they are the tenants of Government.

In execution of what he conceives to be his duty, the Revenue Officer has called upon the occupiers of lands within that estate to point out their lands and to show and establish their titles, and he has declared these titles to be invalid, although the lands have been held under those titles for terms much exceeding the ordinary term of limitation, and although no rents have ever been paid for these lands, nor have any of the respondents otherwise admitted the title of the zamindar.

So far as we can ascertain, no one has appeared before the Revenue Officer on behalf of Government to contest any of the objections raised by persons setting up titles adverse to Government, but instead of bearing in mind that in the determination of these objections, so far as he had any jurisdiction at all, he was acting as a judicial officer, the Revenue Officer has pressed the case of Government to the utmost as against the objecting parties. In one instance he has gone so far as to put aside the fact that in 1874, that is, thirteen years before the proceedings now before us were initiated, the Collector of Midnapur stopped proceedings in resumption directed against one of the titles now set up, and he has re-opened that inquiry and has finally found that this title was invalid. We cannot suppose that in this instance at least, the proceedings of the Revenue Officer can meet with the approval of the Government. But on the procedure adopted we find that the

Revenue Officer has not in all material points acted on his own responsibility. He can point to these rules issued for his instruction and guidance by the Board of Revenue under the authority of Government as directing the course which he has taken, and as has been already stated, he has been misled, for these rules are altogether without any valid or legal authority.

It has long been laid down as a principle of stringent application that suits between the Government and the subject in relation to land revenue or rent must be decided by tribunals wholly uninterested in the result of their decisions. The proceedings of the Revenue Officer in this case were certainly in contravention of this principle, as are the rules under which he appears to have acted, and which, as has already been pointed out, have been made without authority. The omission to pass rules regularly under sections 189, 190 of the Bengal Tenancy Act, is no ordinary irregularity. The course taken deprives the rules of all publicity, which is justly regarded by the Legislature to be of supreme importance, since it deprives all parties interested in any of the matters dealt with by the rules of an opportunity which the law has expressly given them of objecting to any of them and of requiring that the grounds of their objections shall receive due consideration. I think it necessary to lay stress on this that the consequence of the issue of these informal rules and the reason for our interference may be fully understood.

The cases now before us afford an apt illustration of the mischief which must result from any other rule. The proceedings being taken relate to an estate purchased by Government, and therefore under the management of the Board of Revenue, and they have been directed to inquiries as to the validity of titles set up by certain persons to hold certain lands rent-free or revenue-free. Government is necessarily one of the parties and interested itself through its official agents, the Board of Revenue, in the result of these proceedings. It is obvious that the Revenue Officer who is appointed to direct such proceedings should not be a subordinate of one of the parties to those proceedings; what confidence could the other parties have in a Court so constituted? In the cases before us it seems that no one has represented the Government, the proprietor of the estate, before the Revenue Officer.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

If the person at whose instance or for whose benefit a survey and record-of-rights was being made was a party, he would have been represented by some agent at every stage of the proceedings, and this course should have been taken also by Government. The proceedings seem to show that it has fallen to the duty of the Revenue Officer to send for and obtain evidence for the Government in rebuttal of the claims made by the other parties, and so practically to conduct for Government the cases which in a judicial capacity he has ultimately to determine and decide.

The case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1) is not altogether analogous to the cases now before us; for in that case in which a Bench of this Court had to decide whether the matter raised was not *res judicata*, the Court, acting under Chapter X of the Bengal Tenancy Act, found that the occupiers of land belonging to the particular estate had been put into possession as tenants by a previous zemindar and had set up titles purporting to have been granted by him, which were found to be invalid. It is unnecessary for us therefore to express any opinion on that case.

In answer to the question put to us, I would answer that in preparing a record-of-rights under section 102 of the Bengal Tenancy Act a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under enquiry, so as to resume such lands and to declare them to be liable to settlement and assessment of rent unless it can be first proved by the proprietor of the estate that the relation of landlord and tenant exists between him or his predecessor or the occupier of the land or his predecessor.

PIGOT, J.—I agree in the answer given on this reference for the reasons stated in the judgment just delivered by Mr. Justice Prinsep.

O'KINEALY, J.—The circumstances out of which this reference has arisen are as follows:—

On the 14th January 1887, the Lieutenant-Governor issued the following notification:—

"Under the powers conferred upon him by section 101 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor is pleased to order

(1) I. L. R., 17 Calc., 721.

that a survey shall be made and a record-of-rights prepared in respect of all lands included within the boundaries of the Government Estate Kamina Chuk, bearing *towji* No. 802, in the district of Midnapur.

"The particulars to be recorded in the survey and record-of-rights shall be the following:—

"The name of each tenant.

"The class to which he belongs, that is to say, whether he is a tenure-holder, *ryot* holding at fixed rates, occupancy ryot, non-occupancy ryot or under ryot, and if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure.

"The situation, quantity and boundaries of the land held by him.

"The name of his landlord.

"The rent payable.

"The mode in which that rent has been fixed, whether by contract, by order of a court, or otherwise.

"If the rent is a gradually increasing rent, the time at which, and the steps by which, it increases. The special conditions and incidents, if any, of the tenancy.

P. NOLAN,

Offg. Secretary to the Government of Bengal."

This notification follows section 101 of Act VIII of 1885, except that it does not state under which of the clauses (*a*), (*b*), (*c*) or (*d*) the Local Government issued the notification. During the course of the argument, it was at one time suggested that the Local Government was empowered by clause (*d*); but, apparently, if any paragraph of that section applies, it is clause (*c*), as the estate is a permanently settled estate purchased by Government at an auction sale for arrears of revenue.

It will be noticed that under this section and the notification, only the facts existing at the time of the inquiry should be recorded:—The name of each tenant, the class to which he belongs; the situation, quantity and boundaries of the land held by him; the name of his landlord; the rent payable; the mode in which the rent has been fixed; if the rent is a gradually increasing rent, the time at which and the steps by which it increases; and the special conditions and incidents, if any, of the tenancy. These, and these only, are to be stated in the record-of-rights of the estate under the Rent Act, unless other provisions of the Act are invoked.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

It is also worthy of attention that a Revenue Officer under section 102 is not ordinarily a settlement officer determining the amount of Government revenue. In all disputes between landlord and tenant the Revenue Officer holds a judicial position. He is bound to decide between party and party, in the same manner as a Munsif or Subordinate Judge decides an ordinary civil suit.

In the "Settlement Manual" issued by the Board in 1892, I find the following:—

"*General principles applicable to record and determination of rents.*

"The following rules are of general application, whether the settlement proceedings are under the Tenancy Act or Bengal Act VIII of 1879."

I do not purpose to go through these rules in detail, as a few extracts will suffice. Section 104 of the Act provides for cases in which it is asserted that the tenant holds more or less lands than that for which he pays rent, and a contest arises between the landlord and his tenant as to whether the rent should be increased or reduced. By paragraph (3) of that section the Revenue Officer is directed to presume that the existing rent is fair and equitable "until the contrary is proved," and in deciding he must have regard to the rules laid down in the Act for the guidance of the Civil Courts in similar cases. These rules are given in section 52 of the Act, and are inconsistent with any idea other than that each case must be decided on its own merits. The Board's rule runs as follows:—

"The Settlement Officer should collect a large number of cases in which he can identify a field or holding now held with a field or holding formerly recorded, or can obtain the recorded area of a field or holding known to have been unchanged in shape and size or presumed to be so from its being near the homestead or in the centre of cultivation, and a similar list of fields or holdings situated at the edge of the village or near existing waste lands *where it may be reasonable to suppose* that former waste has been encroached upon. The total of two such lists will give him some reasonable ground for a conclusion whether there was a considerable or constant error in the old recorded areas, and if any allowances ought to be made for such error."

This direction is directly opposed to sections 104 and 106 of the Rent Act. The Act does not acknowledge the right of the

Revenue Officer to deal with questions of deterioration other than as the Act directs. It does not recognise averages of increase or of decrease of area nor any other average, but averages of prices.

Again in Chapter V of the same manual, which distinctly refers to the record-of-rights under the Tenancy Act, it is declared by rule 4 that Settlement Officers, whether proceeding under the Tenancy Act or under Act VIII of 1879, must determine the validity or otherwise, and record the incidents, of every tenure and under-tenure. And further on in rule 9, it is ordered that the "Settlement Officer, however, is bound to declare the tenure is invalid, if it be invalid in law, and to fix a legally fair rent for it, leaving it to the superior authorities to allow favourable terms to the occupant if they think fit. These rules are applicable to estates permanently settled and purchased by Government.

Under the Act the Revenue Officer is clearly in all contested matters only subject to the special Judge and the High Court and not to the Board of Revenue. If the Government of Bengal desired to pass such rules, which I think it could not, it would be bound to publish them before-hand in the *Calcutta Gazette*, and hear any objection raised against them. Here the Rent Act is modified by a departmental order issued by the authority of Government.

Under Rules 16 to 20 of the Rules made by the Government of Bengal, the Revenue Officer in charge of the record-of-rights is bound to issue a notification calling on the persons interested in the subject-matter of the inquiry to attend at the time and place specified in the notification to offer such objections as they may wish to take to the proceedings; and on the date specified on the notice or any adjourned day, to read out the entries which the Amin has entered in each *khatian*, and decide any dispute which may arise. A further provision is also made to prevent any injury to the parties concerned. A person may come in under section 106 to dispute the correctness of any entry under Chapter X before the final publication of the record; and then under Rule No. 32 prescribed by the Local Government, the Revenue Officer is bound to serve notices on all persons who, in his opinion, are likely to be affected by the objection, and to call upon them

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

to attend on any day he may fix for hearing the objections. If any person attends and contests the objection, the proceeding takes the form of a litigious case, in which the objector is the plaintiff. If no person attends and contests the objection, the record is to be either amended or the objector is to be called upon to support his case, as an *ex parte* suit under the Tenancy Act.

The respondents appeared and objected that they held certain lands rent-free for a very long time and were not tenants. No notice was issued upon the Government, who claimed to be the proprietor of the land, nor did any person on behalf of the Government appear to contest that they were *lakhirajdars*. It is clear then that the Revenue Officer was bound either to receive the objections to amend the *khatian*, or, if not, to try the suit as an *ex parte* suit under the Rent Act. Had he done so, he would have found that it was the duty of Government to begin, and not that of the *lakhirajdar*.

What he seems to have done was to have called on the objectors to produce evidence in favour of their objections, and to have himself sent for evidence on behalf of Government; and, being of opinion that, although they held the lands for many years, not as tenants, but *lakhirajdars*, that yet they had no proper title to hold the lands as *lakhiraj*, he declared that the lands should be resumed and assessed with the proper rent.

This is not a matter within the Act or Notification, which creates and limits his jurisdiction. He has perfect power to decide any of the matters mentioned in section 102; but no further, and these do not come within that section. For instance, he can decide, and is bound to decide if any dispute should arise, whether the disputed land falls within the local area or not; but if he finds it does not fall within it, he cannot determine to what village or estate it belongs. Again, in a case of contest he may and should determine who, if any, is the tenant and who is the landlord for any portion of land; but if he finds, as in the present case, that the person in possession is neither a landlord nor a tenant, his jurisdiction ceases.

I think, therefore, that the question sent to us by the learned Judges for an answer, namely, whether, in preparing a record-of-rights under section 102 of the Bengal Tenancy Act, a Revenue

Officer is competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent, should be answered in the negative.

GHOSE, J.—I agree in the answer which it is proposed to be given to the question referred to the Full Bench. In doing so, I have a few observations to make.

It seems that the Government in these cases occupies the position of an ordinary zemindar, they having acquired the estate Kamina Chuk by a private purchase, and not at a sale for arrears of Government revenue.

Proceedings in these cases were taken under Chapter X, sections 101 and 102 of the Bengal Tenancy Act, for a record-of-rights and settlement of rents. They were taken in the Court of the Deputy Collector of Tamluk.

By a notification of the Government of Bengal published in the *Calcutta Gazette* for 1890 (Part I, page 121), all Deputy Collectors were authorised to discharge the functions of a Revenue Officer under Chapter X of the Bengal Tenancy Act, and were vested with the powers of a Settlement Officer under Rule I, Chapter VI of the rules framed by Government in that behalf under section 189 of the Act.

I take it therefore that the officer before whom the proceedings were taken had authority to act as a Revenue Officer under the Bengal Tenancy Act, and to make a survey of the lands comprised within Kamina Chuk.

A survey was, as I understand, duly made, and in the course of the proceedings the respondents in these three cases claimed certain lands as *lakhiraj*. The question thereupon arose whether the lands in question were rent-paying or rent-free, how should they be recorded by the Revenue Officer, and whether rent should not be assessed upon them.

The *sanads* produced by the respondents were of dates anterior to the permanent settlement, and it seems to have been their contention that they had never paid rent for these lands.

It does not appear that any evidence was adduced on behalf of Government that these lands at the time of the permanent settlement were assessed to the public revenue, or that at any time

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

afterwards any rent was received either by Government or by their predecessor in title. The Revenue Officer, however, called upon the respondents to prove their rent-free titles, and being of opinion that the *sanads* (with one or two exceptions) produced by them were not genuine, rejected them, and directed that the lands should be assessed with rent as rent-paying lands in the estate.

On appeal the Special Judge has reversed the order of the Revenue Officer, excepting as regards one or two parcels of land, being of opinion that he had no authority to assume the functions of a Resumption Court, and determine the validity or otherwise of the rent-free titles set up.

The question we have to address ourselves to is, what is the function of a Revenue Officer in a matter like this, when any person occupying lands within a local area claims to hold them not as a tenant but as a *lakhirajdar*.

Now, referring to section 102 of the Bengal Tenancy Act, we have the particulars, which may "either without or in addition to other particulars" be specified in the record-of-rights, and they are—

(*a*) The name of each tenant.
(*b*) The class to which he belongs.
(*c*) The situation, quantity and boundaries of the land held by him.
(*d*) The name of his landlord.
(*e*) The rent payable.
(*f*) The mode in which the rent has been fixed.
(*g*) If the rent is progressive, the time at which it is to increase.
(*h*) Special conditions and incidents of the tenancy.

Now, as correctly observed in the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1), these particulars "are such as presuppose the existence of a tenancy," and I think there can be no reasonable doubt that the Revenue Officer in preparing the record-of-rights must determine whether the person who occupies any land within the ambit of the estate is a tenant or not with respect to that land. If he claims to hold it as rent-free and not as a tenant, the

(1) I. L. R., 17 Calc., 721.

Revenue Officer has to find whether the relation of landlord and tenant exists between the parties or not.

But how is that to be determined?

I agree with PRINSEP, J., in holding that a Revenue Officer acting under the Bengal Tenancy Act is not competent to assume the functions of a Resumption Court. These functions can only be exercised by a Civil Court. A Revenue Officer must, however, determine whether the defendant is a tenant or not within the meaning of section 3, clause (3) of the Tenancy Act.

The *onus* is not primarily on the party who claims the land as *lakhiraj*, but it is upon the landlord to prove that the opposite party is a tenant [see in this connection *Harihar Mukhopadhya* v. *Madhub Chandra* (1)]. The landlord may prove this by showing that at some time or other after the permanent settlement, the defendant, or his predecessor in title, either attorned to him or paid rent for the lands. If the relation of landlord and tenant is thus established, the law would presume that that relation has continued to exist unless it be that the defendant had, more than 12 years antecedent to the proceedings, set up, to the knowledge of the landlord, an adverse right to hold the land as *lakhiraj*, in which case the claim of the landlord to receive rent would be held to be barred by limitation. Of course, if rent has ever been paid, mere discontinuance would not necessarily amount to the setting up of an adverse title. But unless the claim is barred by limitation, the opposite party may rightly be regarded as a tenant, and he should in that case be recorded as tenant. If he is so recorded as a tenant, it would, on application of either the landlord or tenant, be open to the Revenue Officer to settle under section 104 of the Act a fair and equitable rent in respect of the land held by him. In the cases before us, the landlord evidently failed to prove that the defendant or his predecessor in title was his tenant for the land in question, nor did the defendant claim to hold under any grant from the predecessor in title of Government subsequent to the permanent settlement [as it was in the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (2)], so as to make him a "tenant" within the meaning of section 3, clause (3) of the Bengal Tenancy Act. The

(1) 8 B. L. R., 566; 14 Moo. I. A., 152.
(2) I. L. R., 17 Calc., 721.

1893

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH.

Revenue Officer was not therefore justified in treating him as such, and in determining what is the proper rent he should pay.

The Revenue Officer in these cases, in assuming the functions of a Resumption Court, and in calling upon the defendant to prove the validity of the *lakhiraj* title set up by him, has, I presume, proceeded upon the authority of a rule promulgated by the Board of Revenue and printed in the Settlement Manual, page 20, and which is as follows:—

"20. When the record-of-rights is being made under the Tenancy Act, and any question arises regarding the validity of claims to hold land rent-free, the Settlement Officer must adjudicate on the question according to law as a civil suit."

This is said to have had the authority of the Local Government; but we do not find that it was passed in the manner required by sections 189 and 190 of the Act.

Upon all these grounds I am of opinion that the question referred to the Full Bench must be answered in the negative.

J. V. W.

PRIVY COUNCIL.

---

*P.C.** 1893 *May* 16, *June* 17.

DELHI AND LONDON BANK, LIMITED (PLAINTIFF), AND A. OLDHAM AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Plaint—Verification of plaint—Civil Procedure Code, 1882, *ss.* 51 *and* 435—*Principal officer of a Corporation or Company—Verification of plaint by acting Manager.*

The Manager at Lucknow of the local branch of the Delhi and London Bank was authorized by a power-of-attorney under the seal of the Company in London, to sue for debts due to the Bank, and to substitute any person for himself, besides doing other acts of management.

A power-of-attorney, executed by him as manager, appointing the accountant of the Bank to be its attorney in Lucknow, did not contain express authority to the person so empowered to sue for debts due to the Bank. The accountant conducted, under this power, the chief business of the branch, and while he was so conducting it this suit was instituted

* *Present:* LORD WATSON, SIR R. COUCH, and the HON'BLE G DENMAN.

against defendants, of whom some objected that he was not authorized to sign and verify the plaint.

1893

DELHI AND LONDON BANK v. OLDHAM.

Held, that section 51, Civil Procedure Code, regulating proceedings by or on behalf of ordinary plaintiffs, did not apply, but that section 435 was applicable, the acting manager appointed as above mentioned being a principal officer of the Bank Corporation within the meaning of that section.

APPEAL from a decree (5th January 1891) of the Judicial Commissioner of Oudh, affirming a decree (31st March 1890) of the District Judge of Lucknow.

On this appeal no fact was in dispute, but it questioned the correctness of the ground on which the Courts below had dismissed the suit, *viz.*, that it had not been instituted by any person authorized to sign and verify the plaint on behalf of the Bank.

On the 2nd May 1889 the plaint was filed to recover from Major A. Oldham, R. N. Hodges, and two others, Rs. 21,275 on a joint and several promissory note. The plaint was signed and verified by A. Lawson, stated to be "Acting Manager of the Bank." On the 20th December, the second defendant filed the objection that the suit could not proceed, because Lawson was not a principal officer of the Bank, and was not otherwise authorized to sue. The third defendant took a similar objection. It was replied that Lawson held a power-of-attorney as manager of the branch authorizing him in all respects. The memorandum and articles of association of the Bank registered in London, under the Companies' Act, 1862, were produced, showing separate clauses whereby the directors were authorized to sue, and to defend suits, as well as to appoint managers, and to determine their duties. By a general power-of-attorney to managers, of 23rd July 1884, the directors appointed, amongst others, W. A. N. Langdon to be the attorney, or agent, of the Company at Lucknow. This document contained express authority to sue on behalf of the Company. It also authorized him to substitute any person to act in his place. On the 23rd November 1887, Langdon appointed Alexander Lawson, who was then accountant to the Bank, to be its attorney for the purpose of executing, discounting, and negotiating mercantile documents, demanding money and giving receipts. No power to sue was given in express terms to Lawson, to whom the management was made over.

1893

DELHI AND LONDON BANK v. OLDHAM.

The District Judge dismissed the suit on the ground that the power-of-attorney, under which alone Lawson was authorized to represent the Bank, did not give him power to sue. This decree was affirmed by the Judicial Commissioner, who held that Lawson was not entitled to sue either under the power-of-attorney from Langdon, or under section 435 of the Civil Procedure Code, as the principal officer of a Corporation. On the Bank's appeal,

Mr. *R. V. Doyne*, for the appellant:—If there was a want of power to institute the suit, and if there was a want of authority to verify the plaint, those defects were to be distinguished the one from the other. There was, however, no want of authority. The plaintiff Company was registered under the English Act of 1862, and the law here applicable was section 435 of the Civil Procedure Code, for, within the meaning of that section, Lawson had become the principal officer of a Corporation. He was acting as the agent and manager of the Company, and not merely as agent of the manager who appointed him. The learned Counsel referred to the Contract Act (IX of 1872), section 188. The officer of the Bank who at the time had the management of its affairs in Lucknow, and who was to be presumed to be cognizant of the facts, had verified the plaint, and that was verification enough. The suit was the Bank's; and the latter now asked that it might be decided that it had authorized this suit, and that the plaint had been duly verified.

Mr. *R. B. Finlay, Q.C.*, and Mr. *J. D. Mayne* for the respondent R. N. Hodges:—Section 435, Civil Procedure Code, would not give effect to the proceedings of a person who had no real authority to sue or to verify the plaint, and in this case there was no signature to the plaint of a person authorized to sue or to verify it. The whole of Lawson's authority was to be gathered from what Langdon had signed as a power to him. The document given by Langdon did not comprehend an authority to Lawson either to sue, or to verify the plaint. Lawson was not authorized to do these acts, or either of them, as a principal officer of the Corporation: for this, in fact, he was not. The result was that the suit in point of law was not brought by the Bank.

Mr. *R. V. Doyne* replied.

On a subsequent day, 17th June, their Lordships' judgment was delivered by

HON'BLE GEORGE DENMAN.—This was an appeal from a decision of the Judicial Commissioner of Oudh, affirming a decree of the District Judge of Lucknow, whereby a suit was dismissed on the ground that A. Lawson, who had signed and verified the plaint, was not a person duly authorized to do those acts or either of them.

The plaint was filed on the 2nd May 1889, and by it the appellants sought to recover from the respondents Rs. 21,275, said to be due to them on a promissory note.

The plaint was signed as follows: "(Signed) A. Lawson, Acting Manager, Delhi and London Bank, Limited, Lucknow."

The verification was in these words, " I, Plaintiff above named, do hereby declare that what is hereby stated is true to my knowledge and belief. (Signed) A. Lawson, Acting Manager, Delhi and London Bank, Limited, Lucknow."

On the 20th September 1889, the respondent Hodges petitioned the District Judge that the plaint might be rejected or returned for amendment on several grounds not now material, and (in paragraphs 1 and 2 of his petition) on the grounds (1) that A. Lawson was not a principal officer, but a mere cashier of the Bank, and not otherwise authorized to sign and verify the plaint; (2) that acting as manager during a temporary illness, or otherwise, of an acting manager or manager, would not without a special power empower A. Lawson to sign and verify the plaint.

There was no dispute about the facts. It was admitted that the plaintiff Bank was a Corporation within section 435 of the Code of Civil Procedure.

That section, so far as it is applicable to the case, is in these words: "In suits by a Corporation . . . the plaint may be subscribed and verified on behalf of the Corporation . . . . by any Director, Secretary or other principal officer of the Corporation . . . who is able to depose to the facts of the case."

The plaintiff Bank had its head office in London, with branch offices at several places in India, including Lucknow. At Lucknow before the 23rd November 1887, one Langdon was manager at the branch Bank at that place, and had been so from July 1884.

1893

DELHI AND LONDON BANK v. OLDHAM.

He acted under a power-of-attorney under the seal of the Company which, in addition to words empowering him to establish an agency for "carrying on the business of the said Company as bankers," contained, amongst other words, enumerating several of the most obvious duties usually discharged by the manager of a branch bank, a power to "ask, demand and receive and (if necessary) sue for and recover from whomsoever it may concern, all debts and sums of money, goods, property and effects whatsoever, which are or shall be due owing or belonging to the said Banking Company on account thereof at . . . . . Lucknow." Then followed express words authorizing Langdon to commence and prosecute actions and suits in respect of any matter relating to the concerns of the Company at Lucknow. It also contained a power to Langdon to substitute and appoint any person to act under or in the place of him in all or any of the matters aforesaid, "the said Banking Company hereby agreeing to ratify and confirm whatsoever the said Langdon or his substitute shall lawfully do or cause to be done in or about the premises by virtue of these presents."

On the 23rd November 1887, Langdon executed a power-of-attorney, by which, after reciting several of the powers contained in the power of the 23rd July 1884, it was witnessed that Langdon thereby appointed Lawson, "Accountant to the said Banking Company in Lucknow, to be the attorney of the said Banking Company in Lucknow," amongst other things, "to ask, demand and receive all debts, &c." (as in the power to Langdon), but this document omitted the words "and, if necessary, to sue for and recover" and the other express power to sue. It however contained these words, "And generally to act in and about the premises in the same manner, and as fully and effectually as the said Banking Company, or the said Langdon might or could do, and as the said Alexander Lawson might or could have done if he had been appointed the attorney of the said Banking Company in and by the said deed poll or power-of-attorney in the stead of the said Langdon."

The decisions now appealed from proceed upon the ground that the omission of the express power to sue in the later document was fatal to the validity of the proceeding, as showing that Lawson was not a person "duly authorized to sign and verify

the plaint" within the meaning of section 51 of the Code of Civil Procedure.

That section, after enacting that the plaint is to be signed by the plaintiff and his pleader, if any, and verified by the plaintiff or some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, provides "That if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf."

Their Lordships are of opinion that section 51 of the Code, which regulates proceedings taken by or on behalf of ordinary plaintiffs, does not apply to such a case as the present, but that this case must be decided with reference only to section 435, which expressly applies to Corporations, and that the sole question is whether Lawson when he signed and verified the plaint was one of the persons described in section 435 by the words "other principal officer of the Corporation."

If he was, their Lordships see no reason whatever to doubt that he was within that section a person who was "able to depose to the facts of the case."

Lawson's position at the time of the action being brought, *viz.*, on the 2nd May 1889, appears to have been this. He was acting under the power-of-attorney of the 23rd November 1887, being accountant to the Company in Lucknow. Langdon, the manager, was away in Cashmere; Banks, whose position is not explained, but who appears to have been a leading officer of the Bank in Lucknow, was ill with small-pox; Lawson, having the large powers expressly conferred upon him by the power-of-attorney of November 1887, was apparently in sole authority; at all events he was conducting the chief banking business of the branch in Lucknow. In the absence of any evidence that any one else was at the time in question doing any act of management, their Lordships think it fair to presume that he was the person of all others best able to depose to the facts of the case, the action being in respect of transactions depending upon documents which would necessarily be accessible to him at the time.

In these circumstances their Lordships are of opinion that Lawson was then, as he described himself, acting manager of the Bank

1893

DELHI AND LONDON BANK v. OLDHAM.

at Lucknow, and that as such he was a "principal officer of the Corporation" entitled to subscribe and verify the plaint within the meaning of section 435 of the Code, and that the suit was properly instituted. They will therefore humbly advise Her Majesty that the decrees of the Lower Courts dismissing the suit be reversed, and the suit be remanded to the Court of the District Judge to be re-admitted, and that the respondent R. N. Hodges be ordered to pay the appellant's costs in both Courts from the date of his objection to the plaint and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lyne and Holman.*

Solicitors for the respondent R. N. Hodges: Messrs. *Walker and Rowe.*

C. B.

---

*P.C.** 1893 *March* 16, *June* 24.

TASADDUK RASUL KHAN (OBJECTOR) *v.* AHMAD HUSAIN AND ANOTHER (PETITIONERS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Sale in execution of decree—Civil Procedure Code, 1882, *ss.* 274, 287, 289, 290 *and* 311—*Material irregularity—Proof of substantial injury.*

The non-compliance with the requirement of section 290 of the Civil Procedure Code that before sales of immoveables in execution of decree thirty days should intervene between proclamation and sale, is a material irregularity within the meaning of section 311. But its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. As to this the latter section requires affirmative evidence.

APPEAL from a decree (16th March 1891) of the Judicial Commissioner, reversing a decree (14th October 1890) of the District Judge of Lucknow.

The appellant was an execution creditor of the respondents, and at the sale, on the 20th March 1890, in execution of the decree, dated 12th October 1889, of which the amount was Rs. 26,712, he purchased for Rs. 57,376 the properties to which these proceedings related, villages in the Bara Banki district. The respondents,

* *Present:* LORD WATSON, LORD MORRIS, SIR R. COUCH, and the HON'BLE GEORGE DENMAN.

two of the four judgment-debtors, on the 12th April 1890 petitioned to have the sale set aside, on the ground that the sale was invalid, because sections 274 and 290, Civil Procedure Code, had not been duly observed. The irregularity alleged was in the sale having taken place within the thirty days prescribed by section 290 as the period to intervene between posting the proclamation and the sale.

The Courts below differed both as to the fact whether this period had elapsed before the sale or not; and as to the effect on the validity of the sale if it had not.

On this appeal

Mr. *J. H. A. Branson*, for the appellant, argued that even if there had been material irregularity shown, the respondents were not entitled to have the sale set aside, as they had not proved that they had sustained substantial injury. He referred to *Megh Lall Pooree* v. *Shib Pershad Madi* (1), *Arunachellam* v. *Arunachellam* (2), and *Sheo Prasad* v. *Hira Lal* (3).

Mr. *R. V. Doyne*, for the respondents, argued that a material irregularity had been shown involving substantial injury to them. Proclamation posted, first at the court-house, followed by a sale before thirty days had elapsed, was not the procedure prescribed, and therefore could not lay a foundation for the sale. Therefore the latter was unauthorized. The importance of the proclamation was seen by what, according to section 287, it must contain. But if it were held that there had been only a material irregularity, then, upon the evidence, substantial injury might be here inferred.

Mr. *J. H. A. Branson* replied.

Afterwards, on the 24th June, their Lordships' judgment was delivered by

LORD MORRIS:—In this case the respondents, who were judgment-debtors of the appellant, filed a petition in the Court of the District Judge of Lucknow on the 12th of April 1890, whereby they sought to set aside the sale of certain villages which had been

(1) I. L. R., 7 Calc., 34.
(2) I. L. R., 12 Mad. 19, L. R., 15 I. A., 171.
(3) I. L. R., 12 All., 440

1893

TASADDUK RASUL KHAN v. AHMAD HUSAIN.

sold by auction by an order of that Court. The principal ground relied upon by the respondents for setting aside the sale was that it took place before the expiration of thirty days required by section 290 of the Civil Procedure Code to intervene between the date on which the copy of the proclamation had been fixed up in the court-house and the day of sale. The matter of this petition came on for hearing before the District Judge on the 7th of June 1890 and subsequent days. On the 14th of October 1890 the District Judge dismissed the respondents' petition and confirmed the sale. The respondents appealed to the Judicial Commissioner of Oudh, who on the hearing of such appeal on the 16th of March 1891 allowed the appeal and set aside the sale.

The appellant was mortgagee of the four villages sold, and he had on the 12th of October 1889 obtained a decree on the footing of his mortgage. In execution of this decree he caused a proclamation of sale to be issued from the Judge's Court on the 13th of February 1890, the sale being announced to take place on the 20th of March following. The main provisions of the Civil Procedure Code regulating sales are as follows:—

Section 274 provides that in the case of immoveable property the order of attachment "shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the court-house."

Section 287 prescribes the statements and information to be given by the proclamation of sale.

Section 289 provides that "the proclamation shall be made in manner prescribed by section 274, on the spot where the property is attached, and a copy thereof shall then be fixed up in the court-house."

Section 290 provides that no sale shall take place "until after the expiration of at least thirty days in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the court-house of the Judge ordering the sale."

It appears upon the evidence that the proclamation of sale was posted in the court-house on the 15th of February 1890 by the

officer who on the 18th and 19th of February posted the proclamation in the villages. The District Judge held that all the proclamations relating to the sale were duly posted more than thirty days before the sale on the 20th of March 1890. Their Lordships cannot concur in that finding, for although the *terminus à quo* under s. 290 is the fixing up in the court-house, and although that took place more than thirty days before the sale, yet the provision of s. 289 prescribes that the posting in the villages should precede the fixing up in the court-house, and consequently the *terminus à quo*, from which the period of thirty days should run, became at the best the 19th of February, which would be short of the thirty days required to intervene before the sale. On the appeal before the Judicial Commissioner he held that the provisions of s. 290, prescribing the thirty days, had not been obeyed, and that without anything more the respondents were consequently entitled to relief under the provisions of s. 311.

That section, under which the petition of the respondents, owners of one-half of the villages, was presented, provides that "the decree-holder or any person whose immoveable property has been sold . . . . may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity."

It was contended on the part of the respondents that the non-compliance with the interval of thirty days between proclamation and sale made the sale a nullity. Their Lordships cannot accede to that contention. The proceeding in this case was brought by the respondents under s. 311, which deals with material irregularity. The non-compliance with the provisions for posting was a material irregularity. But in the cases of *Macnaghten* v. *Mahabir Pershad Singh* (1) and *Arunachellam* v. *Arunachellam* (2), it was held that in all cases of irregularity under s. 311 evidence must be given of substantial injury having resulted. In the present case the decree-holder failed to comply with the full requirements of s. 290, but both on principle and authority their Lordships are of

(1) I. L. R., 9 Calc., 656; L. R., 10 I. A., 25.

(2) I. L. R., 12 Mad., 19; L. R., 15 I. A., 171.

1893

TASADDUK RASUL KHAN v. AHMAD HUSAIN.

opinion that the case must be treated as the respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of s. 311, and in the application of that section it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of s. 290. Their Lordships cannot accept the judgment of the Judicial Commissioner, that loss is to be inferred from the mere fact that a sale was had without full compliance with the provisions of s. 290. The section clearly contemplates direct evidence on the subject.

The other objections of the sale were mostly formal and were overruled by the District Judge on the facts.

Their Lordships are of opinion that the order of the District Judge dismissing the petition and confirming the sale was right, and they will humbly advise Her Majesty that the judgment of the Judicial Commissioner ought to be reversed, and that the appeal to the Judicial Commissioner ought to be dismissed with costs, and the order of the District Judge restored. The appellant will have his costs of the appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondents: Messrs. *Barrow and Rogers.*

C. B.

---

*P.C.** 1893. *June 22 & 25 and July 8.*

GOBIND LAL ROY (DEFENDANT) *v.* RAMJANAM MISSER AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Sale for arrears of revenue—Act XI of 1859, *ss.* 3, 5, 17, 25, *and* 33—*Bengal Act VII of* 1868—*Suit to set aside sale—Exemption from sale of land under attachment by Collector—Bengal Cess Act (Bengal Act IX of* 1880)—*Omission to specify ground of objection in revenue appeal.*

An estate sold for arrears of revenue had been previously brought to a judicial sale by a mortgagee, whose charge preceded that of a puisne

* *Present:* LORDS HOBHOUSE and MACNAGHTEN and SIR R. COUCH.

encumbrancer, whom the present plaintiffs represented. It was not the consequence of the execution sale that puisne encumbrancers, who were not parties to the prior mortgagee's suit, were displaced, or left with nothing but a claim against the surplus proceeds of the sale, if any; and, on the facts, the present plaintiffs had a mortgagee's interest in the estate sold by the Collector, entitling them to sue to have the sale for default in payment of revenue set aside, as contrary to Act XI of 1859.

A sale for arrears of revenue, if for arrears which have accrued while the land has been subject to an order issued by the Collector under the Cess Act (Bengal Act IX of 1880), for the levy of road cess in arrear, is contrary to section 17 of Act XI of 1859: such an order being an attachment within the meaning of that section. But, under section 33 of that Act, in every case where a sale for arrears of revenue is impeached, as being contrary to the provisions of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner under section 25. The above provision in section 33 applies where the sale has been irregularly conducted, and also where the sale has been illegal in consequence of an express provision for exemption of the land from sale for arrears having been contravened.

Lala Gauri Sanker Lal v. *Janki Pershad* (1) referred to.

APPEAL from a decree (8th September 1889) of the High Court, affirming a decree (6th February 1888) of the Subordinate Judge of Rangpur.

This suit was brought by the plaintiffs, respondents, Biprodas Roy, Tarini Pershad Bhattacharji, and Gurudas Roy, executors to the estate of the late Bhagirat Das, deceased, with the object of having set aside the sale of mouza Khurd Muradpore, a mahal in the Rangpur district sold for arrears of revenue by the Collector, and of obtaining a declaration of their title as persons interested in half that estate by assignment from a mortgagee. The defendant, now appellant, was the purchaser at that sale. No facts were in dispute. The Courts below had concurred in dismissing the suit. The principal questions for decision on this appeal were:—Whether the plaintiffs, claiming through a mortgagee of half the estate so sold, were entitled to bring this suit:—Whether there had been irregularity in the essential preliminaries, under a proper construction of the provisions of Act XI of 1859, or illegality by contravention of a prohibition in that Act as to the sale of exempted land, which had invalidated the sale:—or lastly, under section 33,

(1) I. L. R., 17 Calc., 809; L. R., 17 I. A., 57.

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

whether the omission to rely on the latter objection before the Commissioner prevented its being brought forward in this suit.

The title of the plaintiffs, as being interested in the manner above stated through Bhuban Das, mortgagee, father of Bhagirat Das, to have the sale of the estate cancelled, appears in the report of the appeal to the High Court, *viz.*, *Gobind Lal Roy* v. *Biprodas Roy* (1), where all the facts are stated. Raja Gobind Lal Roy, the principal defendant, was the auction-purchaser for Rs. 6,500. The proprietors of Khurd Muradpore, for whose default the estate was sold, were Ramjanam Misser and Mahomed Zakaria Abu Ishak Chowdhry, who were the successors of the original mortgagors. As they had, in the first instance, declined to join the plaintiffs in bringing the suit, and their subsequent application to be joined as co-plaintiffs was made too late, they were co-defendants with the principal defendants, Biprodas Roy and others. There were other defendants, including the Government, which was sued by its statutory name, but did not appear. The date of the sale by the Collector of Khurd Muradpore was the 26th June 1886; of the sale certificate issued to the purchaser was the 8th November 1886, and of possession given to him was the 28th November 1886. Meanwhile a suit, brought by Ramjanam Misser and Mahomed Zakaria Abu Ishak Chowdhry against the original mortgagors to recover the mortgage money by sale of the estate, was pending. On the 10th December 1886 that suit was decreed, and in the decree, inasmuch as part of the property, consisting of half Muradpore, had been sold by the Collector, it was excepted with the reservation that "in case the plaintiffs should get the auction sale of 26th June 1886 set aside, they should be able to revive their claim to make Khurd Muradpore liable." Before this decree Biprodas and his co-executors had appealed against the revenue sale without success, the Commissioner having dismissed their petition on the 23rd October 1886. In the end, within one year, they instituted, on the 19th October 1887, the suit, out of which this appeal arose, to have the revenue sale cancelled, and for a declaration that half Khurd Muradpore was liable to be sold for the mortgage debt. The particulars of the petition to the

(1) I. L. R., 17 Calc., 398.

Commissioner against the revenue sale were these. It was filed by Mahomed Zakaria Abu Ishak, the fourth defendant in the present suit, and by Biprodas Roy with the other representatives of the late Bhagirat Das. The grounds were that the sale notifications had not been duly affixed in the sadar and mufassal, and that the sale had not been authorized in consequence of omission of essential preliminaries, that purchasers could not come forward, and the zemindari had consequently been sold much under its value. The Commissioner was of opinion that no material irregularity had been established, and that the fact of the price paid having been low was not a sufficient ground for setting the sale aside. He noted the tender of a petition from the petitioners on the 23rd October 1886, which he found to be too late, stating the attachment of the estate for road cess in arrear. In fact, on the 9th March 1886, the Deputy Collector, who had been previously authorized by the Commissioner under the provisions of the Cess Act, Bengal Act IX of 1880, having been apprized that there was an arrear of Rs. 188 due for the September 1885 kist of road cess, and the kist of January 1886 in respect of Muradpore, made an order, with the further sanction of the proper authority, attaching that estate; the attachment continuing till the 25th September 1886, or about two months after the date of the revenue sale which was made by the Collector of the same district.

The plaintiffs in the present suit alleged that the sale of 26th June 1886 was contrary to Act XI of 1859, not having been preceded by the notifications in due time required by section 5 of that Act, and that it was illegal also for the reason that the estate at the time was under attachment in virtue of the provisions of the Cess Act, Bengal Act IX of 1880, during the time of which attachment the arrears of revenue had accrued, also that the estate had been sold for much less than it was worth.

The defendant, as auction-purchaser, set up the defences that the plaintiffs as representing a mortgagee's interest were not entitled to bring this suit; that they had no lien upon the estate; that the sale was legally valid, and his right was protected by the sale certificate; that in their appeal to the Commissioner the plaintiffs had not objected on the ground of the attachment under Bengal Act IX of 1880, and that they therefore could not complain

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

on the latter ground now, and they denied that the price was inadequate. Ramjanam Misser and Mahomed Zakaria Abu Ishak, the third and fourth defendants, supported the plaintiffs' allegations.

The Subordinate Judge was of opinion that the plaintiffs had title to sue, and that the revenue sale was invalid with reference to section 5 of Act XI of 1859, inasmuch as due notice had not been given before the 28th March 1886, the estate being at that time under attachment by order of a judicial authority. He was also of opinion that, under section 17, clause 2 of Act XI of 1859, the Collector had no authority to sell at the time when he had sold, because Khurd Muradpore was then under attachment in virtue of proceedings under Bengal Act IX of 1880, the Cess Act. He found that the sale was for an inadequate price, the value of the property being, as he found, Rs. 50,000. He referred to *Lala Mobaruk Lal* v. *The Secretary of State* (1). He decreed that the sale should be set aside, the purchaser to get back his money, with interest, from the Government, the plaintiffs' mortgage lien to continue, and the estate to be liable to be sold in execution of the plaintiffs' decree of the 10th December 1886.

The defendant, Raja Gobind Lal, appealed to the High Court. A division Bench (TOTTENHAM and GORDON, JJ.) affirmed the decree of the Court below. On this appeal the defendants, Ramjanam Misser and Mahomed Zakaria Abu Ishak Chowdhry, supporting, as they had done, the plaintiffs' claim, were respondents with them. Whilst the appeal was pending, Ramjanam Misser sold his right in Khurd Muradpore, on the 6th June 1888, to Ramkishen Das Khettri, and in an application for substitution of his name as that of one of the respondents, the High Court ordered to that effect on the 8th April 1889.

In their judgment the High Court agreed with the Subordinate Judge in holding that a mortgagee might sue under section 33 of Act XI of 1859. They also considered that the Collector acted illegally in selling property which was under civil attachment, without a notification under section 5, and that it was not necessary that the attachment should continue at the time of the sale. They also took the same view as to the proceedings under the Road Cess Act being an attachment within the meaning of

(1) I. L. R., 11 Calc., 200.

section 17, and that consequently the Collector was positively prohibited from selling the property.

It was argued before the High Court that the sale could not be set aside under section 33, because the grounds now urged had not been stated in the appeal to the Commissioner, and also because there was no evidence that the smallness of price proceeded from any of the irregularities complained of. Upon both of these points, the Courts considered that they were bound by the decision of the Full Bench in *Lala Mobaruk Lal* v. *The Secretary of State* (1), and that the provisions of section 33 did not apply to cases of illegality as distinguished from irregularity.

On this appeal

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the appellant, adverting to the contention that the plaintiffs had no such interest in Muradpore as would entitle them to sue to have the sale of 26th June 1886 cancelled, referred to the sale by a prior mortgagee as displacing puisne mortgagees, and leaving them only a claim against the surplus proceeds. The property had been purchased by Ramjanam Misser, to whom possession was given in 1884, and it was submitted that the right of Bhuban Das, as a subsequent mortgagee, was thereby reduced to a claim upon the remainder of the proceeds after the prior mortgage had been satisfied. As to the revenue sale having been rendered invalid, under section 5 of Act XI of 1859, by reason of fifteen days' notice not having been given before the 28th March, the estate being at that time attached by order of a Civil Court, the contention was that section 5 only applied where the judgment-debtor, whose interest was attached, was a proprietor whose name was entered, as such, in the Collectorate records. In any case, the omission to give notice, under section 5, was a mere irregularity, and did not take away the Collector's authority to sell for default. As to the effect of clause 2 in section 17, on which the judgment of the Court below had, as well as on other grounds, proceeded, as depriving the Collector of any power to sell the estate, since at the time of the sale it was under attachment by the revenue authorities for arrears of road cess, in virtue of Bengal Act IX of 1880, this clause should be

(1) I. L. R., 11 Calc., 200.

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

confined in its operation to attachments authorized by the revenue Acts and Regulations; and did not include an attachment authorized by a later Act, passed by a different legislature, for a different object. The errors of the Collector were only irregularities, and were not material; and there was no evidence upon which the Courts could act that the plaintiffs had suffered material injury in consequence of them. But, however contrary to the provisions of Act XI of 1859, that being the ground, when fully established, in a case where material injury had been caused by such contravention, the plaintiffs were not entitled to maintain their suit on any ground which had not been declared and specified in their appeal from the Collector's order to the Commissioner. No objection under the 33rd section, relating to the so-called attachment under Cess Act, 1880, had been duly declared and specified in the appeal to the Commissioner. Clause 2 did not merely apply to irregularities, but all to revenue sales contrary to the provisions of the revenue sale law. Reference was made to the Acts on this subject which preceded Act XI of 1859, *viz.*, Acts XII of 1841, sections 18 and 25; I of 1845, sections 17 and 34. Whatever was an illegality within the prohibitions enacted on the subject of revenue sales was required to be specified and declared before the Commissioner in an appeal to him under section 25 of Act XI of 1859, as a condition precedent to the plaintiffs being permitted to sue to have a revenue sale set aside in a civil suit; the reason, apparently, being that objections to that kind of sale were specially matters that should be brought to the knowledge of revenue officers, who were acquainted with the working of the system. Here the Commissioner's order showed that the question of the effect of the road cess attachment had not been duly raised before him. In the course of the argument reference was made to *Mohabeer Pershad Singh* v. *Collector of Tirhoot* (1), *Bunwari Lall Sahu* v. *Mohabir Pershad Singh* (2), *Baijnath Sahu* v. *Lala Sital Prasad* (3), and *Lala Moharuk Lal* v. *Secretary of State* (4).

Mr. *R. V. Doyne*, for the plaintiffs, respondents, argued that the revenue sale of 26th June 1886 had been rightly set aside by

(1) 15 W. R., 137.
(2) 12 B. L. R., 297; L. R., 1 I. A., 89.
(3) 2 B. L. R. F. B., 1; 10 W. R. F. B., 66.
(4) I. L. R., 11 Calc., 200.

the judgment of the High Court which had rightly held the plaintiffs entitled to sue. Under section 5 of Act XI of 1859, Muradpore having been under attachment by order of a judicial authority from the 26th September 1885, it was incumbent on the Collector, in order to enable him to sell for arrears of revenue fixed to be paid on the 28th March as the last day of payment, to have caused to be affixed notifications of sale fifteen clear days preceding that date; and as he had not done this, there was wanting in this case the authority which the Collector could only acquire under the Act by fulfilling its requirements as to essential preliminaries. The Act was framed on the principle that the authority for the revenue sale depended on the proper issue of the requisite notices. Not only, however, was there a deviation from the procedure prescribed, but an illegality, as distinguished from irregularity, in the sale of the estate, which rendered it wholly void. This was that under the 17th section of Act XI of 1859 the estate, being on the date of the revenue sale under attachment already by the revenue authorities, *viz.*, under the Cess Act, Bengal Act IX of 1880, and otherwise than by order of judicial authority, was not then liable to be sold, as it had been sold, for arrears of revenue. The sale in question was, therefore, wholly void as being contrary to a direct prohibition in section 17. Neither of those objections were merely defects curable by the provisions in section 33 of Act XI of 1859, or in section 8 of Bengal Act VII of 1868, attachment for arrears of road cess being, at all events, an attachment within the meaning of section 17. And as to section 33, the Courts below had come to a right decision in annulling a sale which was contrary to the direct prohibition of the Act, and was on no better basis than a sale where there was no arrear. Whatever the omissions on the part of the zemindar, there must be arrears, as a *sine quâ non*, and unless there were existing arrears, a sale would be null and void. A suit to set it aside might be brought in the Civil Court without previous appeal to the Commissioner—*Baijnath Sahu* v. *Lala Sital Prasad* (1); *Thakoor Churn Roy* v. *The Collector of the 24-Parganas* (2); *Balmokoond Lal* v. *Jirjudhun* (3).

(1) 2 B. L. R. F. B., 1; 10 W. R. F. B., 66.
(2) 13 W. R., 336.
(3) I. L. R., 9 Calc., 271 (275).

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

In reference to section 33, and the requirement of inclusion of the objection in the petition to the Commissioner, the case here was distinguishable from *Lala Gauri Sanker Lal* v. *Janki Pershad* (1); and in a case of absolute prohibition under Act XI of 1859, section 17, the decisions show that a sale might be set aside by a Civil Court on grounds not declared and specified in an appeal to the Commissioner to whose notice, however, the fact of the attachment was actually brought, before his judgment was given on the 23rd October 1886. That the plaintiffs had sustained substantial injury appeared in the inadequacy of the price obtained.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for the respondent Ram Kishen Das Khettri, who had purchased the interest of Ramjanam Misser in the estate, argued in support of the decree of the High Court. They submitted that the case had not been brought within the exceptions created by section 33 of Act XI of 1859; but, on the contrary, was completely within the prohibition of sale enacted in section 17.

Mr. *J. D. Mayne* replied.

Afterwards, on 8th July 1893, their Lordships' judgment was delivered by

LORD MACNAGHTEN:—In June 1886, mouza Khurd Muradpore was sold for arrears of Government revenue. There was little or no competition; and the appellant Gobind Lal Roy bought the mouza at a price which is said to have been much below its real value. The plaintiffs, claiming to be interested in the property as mortgagees of 8 annas, appealed to the Commissioner of Revenue against the sale. In their petition of appeal they alleged various grounds of objection, all of which are now admitted to be untenable. The appeal was rejected on the 23rd of October 1886 when the sale became "final and conclusive" under section 27 of Act XI of 1859, and a certificate of title was issued to the purchaser. Then the plaintiffs appealed to the Board of Revenue; but that appeal was declared incompetent. At last on the 19th of October 1887, just before the expiration of a full year from the date of the Commissioner's order, the plaintiffs brought this suit to annul the sale and to enforce their mortgage.

(1) I. L. R., 17 Calc., 809; L. R., 17 I. A., 57.

The High Court, as well as the Subordinate Judge, held the plaintiffs entitled to relief. From that decision this appeal is brought.

The grounds of appeal in substance are these:—

(1) That the plaintiffs had no interest in the property at the date of the sale for arrears of revenue.

(2) That the sale was authorized by Act XI of 1859, and duly made under the Act.

(3) That if the sale was contrary to the provisions of the Act on the grounds now relied on, section 33 of the Act is a bar to the suit, because those grounds were not "declared and specified" in the appeal to the Commissioner.

As regards the plaintiffs' title to sue, the learned Counsel for the appellant pointed out that the plaint on the face of it showed that the property on which the plaintiffs claimed to have a charge had been sold before the date of the Government sale, under a decree obtained by a prior mortgagee against the mortgagor; and they insisted that such a sale has the effect of displacing puisne mortgagees and leaving them with nothing but a claim against the surplus proceeds, if any. That, however, in their Lordships' opinion is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne incumbrancers are not parties. In the present case the purchaser under the decree has never apparently disputed the right of the plaintiffs as against the land. He was a party to a suit brought by the plaintiffs to enforce their mortgage, which was pending at the date of the Government sale. It is clear from the terms of the decree made in that suit that the right of the plaintiffs against the land would have been established but for the Government sale. He is a party to this suit; and all he claims here is the position of first mortgagee. The first ground of appeal therefore fails.

Both Courts have held that the Government sale was contrary to the provisions of section 5 and section 17 of Act XI of 1859. Section 17 declares that "no estate held under attachment by the revenue authorities otherwise than by order of a judicial authority shall be liable to sale for arrears accruing while it was so

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

held under attachment." In the present case the estate was sold for arrears which accrued while it was subject to an order issued by the Collector under the Cess Act, 1880, for the levy of road cess in arrear. This order, which is termed a "prohibitory order," forbids payment of rent to any person but the Collector until the amount due for road cess is satisfied, and gives priority to the claim for road cess over any demand or claim other than the demand of Government revenue. It was said that such a prohibitory order is not an attachment. In their Lordships' opinion it is an attachment both in form and substance, and an attachment within the letter and meaning of section 17 of Act XI of 1859. Their Lordships therefore have no difficulty in holding that the Government sale was contrary to the provisions of section 17. Whether it was also contrary to the provisions of section 5 is a more difficult question, and as the decision of that question is not necessary for the determination of this appeal, their Lordships think it better not to express an opinion upon it.

The third ground of appeal is one of more general interest. It ought perhaps to be considered as concluded by the judgment of this Board in the case of *Lala Gauri Sanker Lal* v. *Janki Pershad* (1) which was pronounced just after the decision of the High Court in the present case. But that case was heard *ex parte*. The point had not been taken in the Courts below; and no authorities were cited. The question is one of so much importance that their Lordships are glad to have an opportunity of re-considering their opinion, after a full argument by Counsel on both sides and a discussion of all the Indian authorities bearing on the subject. It is not necessary to go through the cases. They show some difference of opinion undoubtedly. But Mr. Doyne was apparently justified in saying that the view which prevailed in India at the date of the institution of this suit was that in cases of illegality, as distinguished from cases of irregularity properly so called, a suit might be brought to set aside a sale on grounds not declared and specified in an appeal to the Commissioner. Their Lordships will now consider whether there is any real ground for that distinction.

(1) I. L. R., 17 Calc., 809; L. R., 17 I. A., 57.

Act XI of 1859 was an amending Act. It was passed, as appears from the title and preamble, in order to improve the law relating to sales of lands for arrears of revenue. The machinery and procedure adopted in the Act for the most part were old, but provisions were introduced in order to give greater protection to persons interested in land subject to Government revenue against the loss of their property through their agents' fraud or their own inadvertence.

Section 3 enacted that upon the promulgation of the Act the Board of Revenue should determine upon what dates all arrears of revenue should be paid up in each district under their jurisdiction, "in default of which payment" the Act declares that "the estates in arrear in those districts except as hereinafter provided shall be sold at public auction to the highest bidder." Then follow minute provisions which may be divided into two classes. One set of provisions prescribes the manner in which sales for arrears of revenue are to be published and conducted, and the dates to be observed in the various proceedings. The other set of provisions in certain specified cases exempts land from sale though in arrear for Government revenue, or declares that under particular circumstances the land is not liable to sale or that the sale shall not be legal. The expressions vary, but there is no difference in substance. It merely comes to this, that in particular cases which are carefully specified, exceptions are made to the generality of the rule laid down in section 3.

Section 25 declares that the Commissioner of Revenue may receive an appeal against any sale made under the Act, if preferred to him on or before the 15th day from the date of sale, or if preferred to the Collector for transmission to the Commissioner on or before the 10th day from the day of sale "and not otherwise," and that the Commissioner shall be competent in every case of appeal so preferred to annul any sale made under the Act, "which shall appear to him not to have been conducted according to the provisions of" the Act. This section is repealed by Bengal Act VII of 1868, but it is re-enacted, with an extension of the time for appealing, and some other variations not material for the present purpose, by section 2 of the Act of 1868.

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

Section 33 of the Act of 1859 declares that no sale for arrears of revenue made after the passing of the Act "shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner under section 25," and it goes on to declare that no suit to annul any sale made under the Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive.

There are no doubt some provisions and some expressions in these sections which appear to favour the view presented by the learned Counsel for the respondents. Their Lordships cannot help being struck by the difference between the times allowed for an appeal to the Commissioner and the time allowed for the institution of a suit to set the sale aside. The periods of 15 days and 10 days mentioned in section 25 are extended by Bengal Act VII of 1868 to 60 days and 45 days respectively. So that the difference is not quite so marked now. But the difficulty remains. Why should a whole year be allowed for the institution of a suit to set aside a sale for arrears of revenue, if the plaintiff in all cases is to be confined to the grounds of objection declared and specified in an appeal made to the Commissioner, and the suit therefore is in reality nothing but an appeal from the Commissioner's order? Then the direction in section 25 to the effect that the Commissioner may annul any sale "which shall appear to him not to have been conducted according to the provisions of this Act" seems to point rather to an irregularity in the conduct of the sale than to a sale in contravention of some express provision of the Act. The reference to "irregularity" in section 33 is even stronger, for it seems to imply that in every case to which that section applies, the complaint must be a complaint on the score of irregularity.

Giving, however, full weight to these considerations, their Lordships, having regard to the scheme of the Act and the express direction contained in section 33, are of opinion that in every case

where a sale for arrears of revenue is impeached as being "contrary to the provisions" of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner.

In the opinion of their Lordships a sale is a sale made under the Act XI of 1859 within the meaning of that Act, when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened.

As regards the reference to irregularity in section 33 upon which the argument mainly turned, it is to be observed that the particular sentence in which it occurs—"and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of"—is not to be found in the earlier Acts of 1841 and 1845. It seems to have been borrowed, without perhaps sufficient consideration, from the Code of Civil Procedure (Act VIII of 1859), which was before the Legislature at the same time as Act XI. Without that sentence the arguments on behalf of the respondents would have been deprived of much of their force. It is difficult to suppose that the introduction of that sentence into the Act of 1859 could have been intended to have the effect of excluding from section 33 all cases of illegality as distinguished from irregularity.

Their Lordships desire to add that in their opinion it would have been most unfortunate if they had been compelled to adopt the construction placed upon the Act by the Courts in India. Sales for arrears of revenue are of constant occurrence; anything which impairs the security of purchasers at those sales tends to lower the price of the estates put up for sale. It is therefore of the utmost importance in the interest of the revenue-paying population of India that all questions that can arise as to the validity of a sale for arrears of revenue should be determined speedily, and that when the sale has once been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds.

1893

GOBIND LAL ROY v. RAMJANAM MISSER.

One point remains to be noticed. It was contended that the objection founded on section 17 was in fact brought forward in the appeal to the Commissioner, though not stated in the petition of appeal to him. This contention rests solely on a passage in the Commissioner's judgment. He says, "a petition has this day been put in, pleading that the estate was attached for arrears of road cess before the March kist fell due, and that it therefore ought not to have been sold at this stage of the proceedings. However, this further plea cannot be admitted." No other trace of this petition is to be found in the record. It was not referred to in the judgment on the appeal to the High Court. The learned Judges of the High Court say:—"If section 33 does apply, then it appears to us clear that the suit must fail, because the grounds now taken under sections 5 and 17 of Act XI were not declared and specified as section 33 requires in the appeal preferred to the Commissioner." Under these circumstances, assuming that in an appeal to the Commissioner the appellant is not tied down to the grounds alleged in his petition, and that after the time for appealing has passed he may bring forward sound objections so long as an appeal on grounds that are unsound is pending, their Lordships would not be justified in also assuming that the petition to which the Commissioner alluded, if it was put in by the plaintiffs, was put in at a time when it could have been taken into consideration. The inference seems to be that it was not presented until the proceedings were practically closed.

In the result, therefore, their Lordships will humbly advise Her Majesty that this appeal should be allowed and the decrees of the Courts below reversed, and the suit dismissed. The respondents must pay the costs of this appeal and the costs in the High Court, and the plaintiffs must pay the costs of the appellant in the Court of the Subordinate Judge.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitors for the respondents, Biprodas Roy, Tarini Pershad Bhuttacharji, and Gurudas Roy: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent, Ramkishen Das Khettri: Mr. *H. Sowton.*

C. B.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

MAHOMMED ZOHURUDDEEN *v.* MAHOMMED NOOROODDEEN AND OTHERS.*

1893
September 8.

Attorney and client—Lien of attorney for costs—Application for costs to be paid out of money in hands of Receiver in the suit—Regular suit—Practice—Attachment of money in hands of Receiver in a suit—Attachment made without sanction of Court—Civil Procedure Code (Act XIV of 1882), *s.* 272.

The attorneys for the plaintiff claimed a lien, on the amount in the hands of the Receiver of the Court to the credit of the plaintiff in a partition suit, for the costs of the suit which had been secured by the deposit with the attorneys of the title deeds of the plaintiff's family dwelling-house which formed a portion of the property sold by the Receiver under the decree in the suit. *Held,* on an application by the attorneys for payment to them of such costs, that the lien could not be given effect to in summary proceedings of this nature, but should form the subject of a regular suit. Except in such a suit it is not the practice of the Court to make any order for payment of costs between an attorney and his client.

Domun v. *Emaum Ally* (1) followed.

An attachment of money in the hands of the Receiver made without previous permission or sanction of the Court for such attachment is improper and irregular, and the Court will refuse to recognize it.

Kahn v. *Alli Mahomed Haji Umer* (2) followed.

THIS was an application that certain money in the hands of the Receiver of the Court to the credit of Mahommed Zohuruddeen, the plaintiff in this suit, should be paid to the plaintiff's attorneys to satisfy costs incurred by them in the course of the suit. The material facts which led to the application, as appeared from the affidavit of Mr. N. S. Watkins, a member of the firm of attorneys acting for the plaintiff in the suit, which was filed in support of the application, were as follows :—

The suit was instituted in 1888 for partition of the immoveable property of Mahommed Pak Aktar, deceased, and of certain immoveable properties comprising premises at Tallygunge in the

* Original Civil Suit No. 241 of 1888.

(1) I. L. R., 7 Calc., 401. (2) I. L. R., 16 Bom., 577.

1893

MAHOMMED ZOHURUD-DEEN v. MAHOMMED NOOROOD-DEEN.

suburbs of Calcutta (being about 14 bighas and 10 cottahs of land with buildings thereon) forming the family dwelling-house of Mahommed Pak Aktar. The defendants were Mahommed Noorooddeen, Zoohoora Begum, Woozeerunnissa Begum *alias* Moona Begum, widow of Mahommed Nasseerooddeen, Azeemunnessa Bibee Kowar of Mahommed Pak Aktar, Mahommed Roheemooddeen and Mahommed Nussurooddeen Hyder, the last two mentioned defendants being the sole surviving trustees of a settlement dated 29th August 1868. The plaint referred to disputes which had arisen between the heirs of Mahommed Pak Aktar with reference to the said trust property, and which had been referred to arbitration; but owing (as was alleged) to the action of Mahommed Noorooddeen, the first defendant, the arbitrations had been infructuous; and the plaint stated that by reason of such action on the part of Noorooddeen the costs of the arbitration had been unnecessarily incurred, and it therefore prayed that Noorooddeen might be ordered to pay all the costs of the arbitration proceedings, and that a Receiver might be appointed to take charge of the estate pending the decision of the suit. By an order of 2nd July 1888 the Receiver of the High Court was appointed Receiver of the estate, and was put into possession of it including the family dwelling-house and premises.

Both before and after the institution of the suit the plaintiff had executed mortgages on his share of the property in favour of Surrut Chunder Mullick and Toolsey Das Pal, and an order dated 21st August 1890 was made in the suit, that the Receiver should be at liberty to carry out a certain contract referred to in the order, for the sale to one Nursing Chunder Mookerjee of a portion of the said property and to sell the rest of the property (which included the family dwelling-house and premises) either by public auction or private contract, and out of the sale proceeds (after retaining his own commission, the cost of the sale and expenses of repairs, &c.) to pay the several mortgage debts due on the property according to their priority, and to invest the balance in Government securities to pay for the maintenance of the parties; and it was also ordered that the costs of the mortgagees Surrut Chunder Mullick and Toolsey Das Pal and of mortgagees of shares of the estate other than that of the plaintiff, should be added to the amount of their respective mortgage claims.

Under the above order the portion of the property including the family dwelling-house was put up to auction on 10th February 1891, and the lot containing the family dwelling-house was purchased by the plaintiff for Rs. 17,700; this sum was by an order dated 4th June 1891 debited by the Receiver to the share of the plaintiff of the sale proceeds of the whole estate of Mahommed Pak Aktar after payment of the charges and expenses mentioned in the order of the 21st August 1890, and it was ordered that if the plaintiff's share were insufficient to pay the said purchase-money, the plaintiff should pay the deficiency to the Receiver. Mr. Farr, a member of the firm of Watkins and Company, had acted as attorney for the plaintiff in the arbitration proceedings and in the suit, and a sum of about Rs. 13,000 was owing by the plaintiff to him as such attorney on account of out-of-pocket costs and legal charges, fees to the arbitrators, and other expenses incurred in the said proceedings and suit, the amount being subject to taxation; and on 6th July 1891, by way of equitable mortgage in favour of Mr. Farr, the plaintiff deposited with him the title deeds of the family dwelling-house and premises as security thereon for the payment of the sum due to him for costs, &c., and gave him an agreement to mortgage which was duly registered; he also executed in favour of Mr. Farr a promissory note for the amount due with interest. On 16th December 1891 a consent decree was made which (among other things) gave the plaintiff a certain share in the property of the late Mahommed Pak Aktar, and ordered that the Receiver out of the funds in his hands should in the first place pay the taxed costs of the respective parties to the suit and their respective attorneys, and should divide the residue of the said funds into 70 equal parts and pay 26 of such parts (subject to the payment of the mortgages and certain other charges) to the plaintiff. The consent decree also directed that all costs of the parties to the suit, including all undisposed of or reserved costs, should be paid by the Receiver out of the funds in his hands as Receiver in the said suit. The share of the plaintiff in the sale proceeds of the estate (after the payment of the charges on it) was insufficient for the payment of the Rs. 17,700, the purchase-money of the family dwelling-house bought by the plaintiff, the deficiency amounting to about Rs. 9,200, which ought in terms of the order

1893

MAHOMMED ZOHURUD-DEEN v. MAHOMMED NOOROOD-DEEN.

of 4th June 1891 to have been paid by the plaintiff to the Receiver, but he failed to pay it when called on to do so, and consequently the Receiver on 4th July 1893, under the conditions of sale on which the plaintiff had made the purchase, re-sold the family dwelling-house and premises on the plaintiff's account, and it was purchased by one Rohim Bux Ostagur for the sum of Rs. 17,900, which was paid by the purchaser to the Receiver, though no conveyance of the subject of the sale had at the date of this application been made to the purchaser. After paying off the deficiency of Rs. 9,200, there remained in the hands of the Receiver as the balance of the sale proceeds of the family dwelling-house and premises the sum of about Rs. 8,700. The costs and expenses secured by the deposit of title deeds (exclusive of the plaintiff's party and party costs of the suit for payment of which provision was made by the decree of 16th December 1891) amounted to about Rs. 10,246, the bills of costs for which had been lodged for taxation, but the taxation of all the bills had not been completed. Mr. Farr left the firm of Watkins and Company on 31st December 1890, and by deed of that date assigned all his right, title and interest under the equitable mortgage of 6th July 1891 to that firm, who held the title deeds of the family dwelling-house and premises by way of security.

On 26th August 1893 a prohibitory order issued from the Court of the Subordinate Judge of the 24-Parganas, attaching on behalf of Mirza Ali Asgar, the execution creditor in a suit against the plaintiff Zohuruddeen in that Court, the sum in the hands of the Receiver to the credit of Zohuruddeen on account of the sale proceeds of the estate of Mahommed Pak Aktar.

It was also stated in the petition that Rohim Bux Ostagur having paid the purchase money of the family dwelling-house, claimed to be entitled to have his purchase conveyed to him free from incumbrances, including Messrs. Watkins and Company's equitable mortgage of 6th July 1891, and the petitioner stated that he was willing to execute a re-conveyance of the family dwelling-house on having paid to him the sum of Rs. 8,700, the balance of the purchase-money of the family dwelling-house, but that the Receiver would not make such payment without an order of Court.

The plaintiff, Mirza Ali Asgar the attaching creditor, and Rohim Bux Ostagur the purchaser of the family dwelling-house from the Receiver on 4th July 1893, were, as well as the Receiver, served with notice of the application.

Mr. *P. O'Kincaly* in support of the application.

Mr. *Mitter* for Mirza Ali Asgar.

Mr. *T. A. Apcar* for Rohim Bux Ostagur.

The plaintiff appeared in person.

The arguments sufficiently appear from the judgment.

SALE, J.—This was an application made on behalf of the attorneys of the plaintiff in this suit for payment out to them of a sum of money belonging to the plaintiff, now in the hands of the Receiver.

The suit was for partition of various properties including the family dwelling-house at Tallygunge. There was in this suit originally a reference to arbitration, which proved infructuous. Both in the suit and in connection with the arbitration proceedings Mr. Farr, an attorney of this Court and a member of the firm of Watkins and Company, appears to have supplied out-of-pocket costs, and also to have become entitled to costs for work done by himself. To secure the costs due to Mr. Farr, the plaintiff on the 6th of July 1891 deposited with him the title deeds of the family dwelling-house. Previously by an order, dated 21st August 1890, the Receiver was directed to sell all the immoveable properties. Under that order he sold the family dwelling-house to the plaintiff. By another order, dated the 4th June 1891, it was directed that the purchase-money for the dwelling-house be debited to the plaintiff's share of the sale proceeds of all the immoveable properties after payment thereout of certain prior charges, and that if the balance should not be sufficient for the payment in full of the purchase-money, the plaintiff should pay the amount of the deficiency. Then there was a consent decree, dated the 16th July 1891, by which, amongst other things, the Receiver was directed to pay the costs of the present suit and divide the residue of the fund in his hands into 70 equal parts or shares, and to pay to the plaintiff the balance out of 26 of such parts or shares after payment thereout of what was due on two mortgages.

1893

MAHOMMED ZOHURUD-DEEN v. MAHOMMED NOOROOD-DEEN.

The result of the account made up under the order of the 4th of June 1891, was that there was a large balance due by the plaintiff which he was unable to pay. The Receiver then resold the family dwelling-house on account of the plaintiff, and after debiting him with the amount due by him for purchase money, there remained in the hands of the Receiver a sum of Rs. 8,700 to credit of the plaintiff. It is in respect of this sum that Messrs. Watkins and Company claim a lien under the original deposit of title deeds. It also appears that as regards the costs due to them, both in respect of the arbitration proceedings and this suit, a part has been taxed and the rest is subject to taxation. The main question in the case is whether, in an application of the present character, it is open to me to make any order for payment. The matter is further complicated by the circumstance that a creditor who obtained a decree in the Court of the 1st Subordinate Judge of Alipore has through the Calcutta Court of Small Causes, issued execution and attached this fund in the hands of the Receiver by a prohibitory order. Notice was given to this creditor, and he appeared on this application and objected to payment out of this money. The purchaser of the property on resale on account of the plaintiff also received notice of the application, and he appeared, but his presence, it appears to me, is unnecessary, inasmuch as he cannot be affected by the order which is sought in this application by Messrs. Watkins and Company. The applicants contend that, so far as the attachment by the mofussil creditor is concerned, it is irregular and improper, inasmuch as it was an attachment of money in the hands of the Receiver of this Court made without the leave or sanction of this Court, and upon that ground, it is said, it being a contempt to attach money in the hands of the Receiver without the permission of this Court, that the attachment is not one that this Court will recognise.

Mr. Mitter referred to the terms of section 272 of the Code, and contended that the attachment of money in the hands of the Receiver was authorised in execution of decrees, and that, though the present attachment is an attachment before judgment, there is no distinction in point of principle between an attachment in execution and one before decree. He contended under the terms of section 272 that the attachment is authorised to be made by a

notice to the Court in whose custody the property attached was, or to the public officer having the custody of the property proposed to be attached, and that the Receiver can be in no better position than the Court itself of which he is an officer. I think this argument overlooks an important distinction between the case of property which is in the custody of the Court and that of property in the custody of a Receiver appointed by the Court. The appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the Receiver, except by permission of the Court. I think that the words of section 272 were not intended to alter, and do not in fact alter, what has been the practice of this Court, which is to require that persons attaching property in the hands of the Receiver of this Court should previously obtain the permission and sanction of this Court, and to regard an attachment not so authorised as a breach of the injunction and therefore a contempt of Court.

It is not suggested when a matter of this character has been brought to the notice of the Court, that the Court has ever recognised an attachment made without the permission of the Court. On the other hand, there are cases where it is pointed out that property in the hands of the Receiver is not liable to attachment without the sanction of the Court appointing the Receiver. The case of *Kahn* v. *Alli Mahomed Haji Umer* (1) lays down that this is the practice also in the High Court at Bombay. To that practice I propose to adhere. I must therefore decline to recognise the attachment which has been issued by the Mofussil Court on this fund in the hands of the Receiver of this Court, inasmuch as it appears that no permission or sanction for such attachment was obtained from this Court.

But the question still remains as to whether, on this present application, I ought to make the order asked for. I do not think it is possible for me to give effect to the lien claimed by Watkins and Co. That can only be done by suit. Nor is it open to me to make an order in a summary proceeding of this kind against a client in favour of his attorneys. That has been decided, as far as this Court is concerned, in the case of *Domun* v. *Emaum Ally* (2), where

(1) I. L. R., 16 Bom., 577. (2) I. L. R., 7 Calc., 401.

1893

MAHOMMED ZOHURUD-DEEN v. MAHOMMED NOOROOD-DEEN.

it was laid down that it was not the practice to make an order for payment of costs between an attorney and his client except in a regular suit against the client. But it is to be remembered that the plaintiff, who appeared in person, while objecting to the payment of this fund to the attorneys, did not dispute the deposit of title deeds, or that the money was due to the attorneys. I think the better course will be to give the applicants the opportunity of establishing their claim by suit, and then of renewing this application if so advised. For that purpose the present application may stand over.

The plaintiff appeared in person, and no question of costs arises as far as he is concerned.

As regards the attaching creditor, I make no order as regards his costs either, nor do I make any order as regards Mr. Apcar's client the subsequent purchaser, who, as far as I can judge, need not have appeared.

Attorneys for the applicant: Messrs. *Watkins and Co.*

Attorney for the defendant: Baboo *O. C. Ganguli.*

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1893 *September* 4.

RASH BEHARI DAS (PETITIONER) *v.* BALGOPAL SINGH (OPPOSITE PARTY).*

Judgment—Judgment of Appellate Court—Criminal Procedure Code (Act X of 1882), *ss.* 367 *and* 421—*Appeal rejected without any reasons given.*

An Appellate Court on rejecting an appeal under the provisions of section 421 of the Criminal Procedure Code need not give its reasons for the decision.

ON the complaint of one Balgopal Singh, Rash Behari Das, the petitioner, was charged by the Sub-Deputy Magistrate of Contai,

* Criminal Revision No. 503 of 1893, against the order passed by L. P. Shirres, Esq., District Magistrate of Midnapore, dated the 2nd August 1893, affirming the order passed by Baboo Narendra Kumar Chowdhry, Sub-Deputy Magistrate of Contai, dated 31st July 1893.

under section 323, Penal Code, with the offence of voluntarily causing hurt, to which charge the petitioner pleaded not guilty; but the Sub-Deputy Magistrate found him guilty of the said offence and sentenced him to simple imprisonment for three weeks and to pay a fine of Rs. 25; in default, further simple imprisonment for one week.

Against this finding and sentence the petitioner preferred an appeal; and on the 2nd August 1893, the Magistrate of Midnapore rejected the appeal. The judgment of the appeal Court consisted merely of the words "appeal rejected."

Rash Behari Das filed a petition to the High Court, in which he prayed that the sentence might be set aside on the ground (among others) that the judgment of the Magistrate, dated 2nd August 1893, was bad in law inasmuch as there was no judgment passed by him in accordance with law.

Baboo *Jagat Chandra Banerjee* for the petitioner.

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

Baboo *Jagat Chandra Banerjee*:—Chapter XXVI of the Criminal Procedure Code relates to judgments in criminal cases. Section 367 has reference to judgments of Courts of first instance, and section 424 to judgments of Appellate Courts. It is clear from these two sections that judgments must contain reasons, and numerous decisions of this Court and of the High Courts of Bombay and Allahabad have upheld that view: see *Kamruddin Dai* v. *Sonatun Mandal* (1), *In the matter of the petition of Ram Das Maghi* (2); *In re Shivappa* (3), and *Queen-Empress* v. *Hargobind Singh* (4). Even in summary trials reasons must be given in the judgment, although no evidence need be recorded,—see section 263 of the Code. Now, the question is whether in a summary rejection of an appeal under section 421 reasons need be given. It is submitted that it could never have been intended by the Legislature that no reasons should be recorded when the Judge rejects an appeal summarily. [TREVELYAN, J.—What is the meaning of those words "summarily reject"?] Those words mean rejection without sending for the

(1) I. L. R., 11 Calc., 449.
(2) I. L. R., 13 Calc., 110.
(3) I. L. R., 15 Bom., 11.
(4) I. L. R., 14 All., 212 (272, 273).

1893

RASH BEHARI DAS v. BALGOPAL SINGH.

record. The next section, *viz.* section 422, makes that meaning perfectly clear. It should be borne in mind that unless reasons are recorded, the accused is placed in a position of great disadvantage with regard to motions before the High Court in revision. The cases of *Queen-Empress* v. *Ram Narain* (1) and *In the matter of the petition of Bala Subbana* (2), are in my favour.

The *Officiating Deputy Legal Remembrancer* for the Crown :— There is no appeal "pending" until the appeal has been admitted; see section 426. An appeal is not *heard* if rejected summarily; see section 422 There is a distinction between a "dismissal" and "rejection"; as to the former, see sections 421, 423; as to the latter, see sections 421, 422. It is only when an appeal is heard that reasons need be given in the judgment. No judgment is needed in a summary rejection, and therefore no reasons are required. Section 424 deals with judgments of Appellate Courts: surely that means judgments in appeals. It is submitted that there cannot be any judgment in an appeal which has not been heard or admitted, but has been summarily rejected. Section 430 contemplates "judgments" and "orders" of Appellate Courts; it is submitted section 421 involves an "order," not a "judgment." Where the Legislature wants reasons to be recorded, it has carefully expressed that intention in clear terms—see sections 213, 249, 253, 257, 263, 264, 307 and 426. We find the term "judgment" used in section 249 for the first time in the Code, and it is there used in connection with judgments of acquittal and conviction. [TREVELYAN, J.—Is there anything in the Code to show that there is to be a judgment when the appeal is heard?] No, not in express terms. [TREVELYAN, J.—Then that is an argument against you, for we know there must be a judgment in such a case.] The word "judgment" is also used in sections 338, 347, 404, 425, 537, 548, and in Chapter XXVI. As to what is a judgment, and what it should contain, see section 367. Under section 421 the points for determination are, *first*, whether the appeal is to be admitted, or, *secondly*, to be rejected. The wording of the section itself supplies the reason for rejection, *viz.*, that the Court "considers that there is not sufficient ground for interfering." [TREVELYAN, J.—Unless a judgment is given under section 421, how are we to

(1) I. L. R., 8 All., 514. (2) Weir's Rep., 1009.

know, without sending for the record, that the Judge has exercised a proper discretion in rejecting an appeal?] The same reasoning may be applied to a case under section 422, where the Judge admits an appeal. It may be argued that the Judge must write a judgment when he admits an appeal. The words of section 421 show that no judgment need be given. In case the High Court think it necessary to interfere, the original record containing the judgment of the first Court is available. The decisions in *Baidya Nath Singh* v. *Muspratt* (1) and *Yacoob* v. *Adamson* (2) were arrived at on the ground that it would be impossible for the High Court to act owing to want of material for acting: but that is not the case here.

With regard to the cases cited, the case of *Queen-Empress* v. *Ram Narain* (3) is not the judgment of a Divisional Bench; it is the judgment of a single Judge. [RAMPINI, J.—In that judgment I do not understand Brodhurst, J. to say that the Judge under section 421 must write a judgment; he merely says the Judge should give reasons.] That is so. The observation, besides, is an *obiter dictum*. Moreover, if under section 421 we take it that the summary rejection is only an order (and it is spoken of as an "order" in the above case), then no reasons need be given. The case of *In the matter of the petition of Bala Subbana* (4) is in my favour.

Baboo *Jagat Chandra Banerjee* in reply:—The case of *Queen-Empress* v. *Ram Narain* (3) decides that "reasons must be given" for the *decision* of the Judge, and the decision of the Judge is his judgment. [RAMPINI, J.—But it does not lay down that a judgment must be written.] "Judgment" and "decision" are interchangeable terms, and the reasons given by the Judge for his decision form his judgment.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

The question in this case is whether an Appellate Court, in rejecting an appeal under the provisions of section 421, Criminal Procedure Code, is obliged to give a judgment containing the particulars enumerated in section 367 of the Code, or at any rate,

(1) I. L. R., 14 Calc., 141.
(2) I. L. R., 13 Calc., 272.
(3) I. L. R., 8 All., 514.
(4) Weir's Rep., 1009.

1893

RASH BEHARI DAS v. BALGOPAL SINGH.

give reasons for its decision. In this case the Magistrate of Midnapore, acting as an Appellate Court, has, in rejecting the appeal, simply recorded the words "appeal rejected." The question is an important one affecting a large number of tribunals in this country. So far as we know, this Court has always considered that section 421 does not require a formal judgment of any description. There seems to be no reported or decided case on the subject in this Court. In a case of *In the matter of the petition of Bala Subbana* (1) a Division Bench of the Madras High Court expressly held that no judgment was necessary. Mr. Justice Brodhurst, sitting as a Division Bench of the Allahabad High Court, expressed an opinion that reasons, however concise, should be given for rejecting an appeal under section 421 [see *Queen-Empress* v. *Ram Narain* (2)]. The decision of this point was not absolutely necessary to Mr. Justice Brodhurst's decision, but he expressed the opinion after argument of the question. We think that the question really depends upon the meaning of the word "summarily" in section 421 of the Code. In the absence of that word, there would seem from the Code to be no reason why a judgment is more required in a case where an appeal is heard and dismissed than in a case where it is rejected under section 421, but the word "summarily" we think differentiates the cases. The word "summarily" ordinarily means in an informal manner and without the delay of formal proceedings. This, we think, would seem to show that the Judge was entitled to reject the appeal without any formality at all; therefore, without the formality of either a recorded judgment or reasons of any description. We think we are supported in this conclusion by the construction which this Court has, as far as we know, ordinarily placed upon section 421, and we see no reason to express any opinion which will have the effect of causing subordinate tribunals to depart from the practice which they have followed,—at any rate in this Province, for some time. There is no other question in the case. As far as the sentence is concerned, it does not seem to be excessive. We discharge the rule.

Rule discharged.

J. V. W.

(1) Weir's Rep., 1009.

(2) I. L. R., 8 All., 514.

ORIGINAL CRIMINAL.

Before Mr. Justice Pigot.

QUEEN-EMPRESS *v.* SUKEE RAUR AND OTHERS.*

1893
August 26.

Penal Code (Act XIV of 1860), *s.* 372—*Letting to hire a girl under sixteen for immoral purpose for one occasion—Prostitution for a course of life—Criminal Procedure Code (Act X of* 1882), *ss.* 219, 226, 273.

A young prostitute under 16 years of age was brought to a house of assignation by the accused at the request of the complainant and for his supposed use on that one occasion, it not being contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by him for that course of life. *Held*, that such a letting out by the accused was not within the meaning of section 372 of the Penal Code, which on the authorities contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse.

Dowlath Bee v. *Shaik Ali* (1) followed.

On the 22nd July 1893, certain persons M. and C., both belonging to the American Methodist Mission, went to a house in Free School Street and there saw one Gungaram Das (accused No. 3), who asked them if they required a girl; whereupon M. asked the third accused if he knew what he was doing, and the accused replied that he knew what he was doing, and that this was his business: he further said if he were paid Rs. 2 he would bring a girl. M. paid to the accused No. 3 two rupees and told him to bring a girl to the house at 4 P.M. M. and C. then went away and returned at 4 P.M. to the house; they there found one Sukee Raur, Dinoo Das and Gungaram (the 1st, 2nd and 3rd accused respectively).

The accused Nos. 2 and 3 then came up to M. and C. and said, "we have brought the girl." The accused Nos. 2 and 3 represented to M. that accused No. 1 was the mother of the girl, and M. therefore asked them if he ought not to make the arrangement with her; they said "no;" M. did not speak to the first accused at all. The

* Case No. 6 of the 4th Sessions of 1893.

(1) 5 Mad. H. C., 473.

1893

QUEEN-EMPRESS v. SUKEE RAUR.

accused Nos. 2 and 3 then took M. into another room and there pointed out to him a girl named Prosunno *alias* Lukhi, seated on a bed. C. was then outside the room, but could see into it. They told M. that he could have the girl for an immoral purpose. M. then asked "for how much"; the accused Nos. 2 and 3 said, "According to time; Rs. 5 for a short time and Rs. 50 if the girl is bought outright." M. then paid to the accused No. 3 Rs. 5, and the latter handed the girl over to M. M. took the child by the hand and placed her on a chair and told C. to go out and change a note. C. went out and brought in the police, who arrested the three accused.

The three accused were committed to the Sessions charged under section 372 of the Penal Code, and also separately under section 109 of that Code. After the commitment, but before trial, supplementary evidence was taken and sent up to the Sessions Court, which showed that the girl was at the outside 12 or 13.

The learned Sessions Judge (Mr. Justice PIGOT) on perusal of the depositions, and before the commencement of the trial, was of opinion that the charge was unsustainable, and that the procedure laid down in section 273 of the Criminal Procedure Code should be followed.

The *Officiating Standing Counsel* (Mr. *Pugh*) admitted that *Doulath Bee* v. *Shaik Ali* (1) was against him; but referred to *Queen* v. *Nowrjan* (2), and contended that the words "employed or used" equally referred to a single employment or user as well to an habitual employment or user; and asked that a charge of abetment of rape might be added.

PIGOT, J.—In this case the prisoners are charged thus:—That Sukee Raur, Dinoo Das and Gungaram Das on or about the 22nd day of July 1893, in Calcutta, let to hire, or otherwise disposed of, one Prosunno otherwise called Lukhi, a minor under the age of 16, to wit, of the age of 11 years or thereabouts, with intent that she might be employed or used for the purpose of prostitution, or for an unlawful and immoral purpose, and thereby the said Sukee Raur, Dinoo Das and Gungaram Das committed offences punishable under section 372 of the Indian Penal Code. 2*ndly*—That

(1) 5 Mad. H. C., 473.

(2) 6 B. L. R., Ap. 34; 14 W. R. Cr, 39.

the said Sukee Raur, at or about the time and in the place aforesaid, abetted the said Dinoo Das and Gungaram Das in committing the offence in the first charge mentioned, which offence was committed in consequence of such abetment, and thereby she, the said Sukee Raur, committed an offence punishable under sections 109 and 372 of the Indian Penal Code. *3rdly*—That the said Dinoo Das abetted the said Sukee Raur and Gungaram Das; and *4thly*—That the said Gungaram Das abetted Sukee Raur and Dinoo Das.

Under section 273 of the Criminal Procedure Code, in trials before this Court, when it appears to the High Court, at any time before the commencement of the trial of a person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying the proceedings upon the charge or portion of the charge, "as the case may be."

Now upon the informations, I am clearly of opinion that an offence under section 372 of the Indian Penal Code is not made out, and it becomes my duty, I think, to act upon that opinion, and to stay the proceedings by making an entry as contemplated by the section. Section 372, Indian Penal Code, under which this charge is made, and section 373, relate to the same subject-matter; that is to say, to the letting to hire, selling, or otherwise disposing of, any minor under the age of 16 years with a certain intent. The first of these two sections contemplates an offence committed by the person who sells, lets to hire, or otherwise disposes of, any minor under the age of 16 years as aforesaid. Section 373 relates to the case of the person who buys, hires, or otherwise obtains possession of, any minor under the age of 16.

Section 372 is in these words: "Whoever sells, lets to hire, or otherwise disposes of, any minor under the age of 16 years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful or immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years." Section 373 says, "Whoever buys, hires, or otherwise obtains possession of, any minor under the age of 16 years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful or immoral purpose, or knowing it to be likely that such

1893

QUEEN-EMPRESS v. SUKEE RAUR.

minor will be employed or used for any such purpose, ... shall be punished, &c." as in preceding section.

Now, the mischief contemplated and against which those sections were framed to provide, is the selling or letting out or dedication of minors for the purpose of prostitution or for any unlawful and immoral purposes as a course of life. This is the mischief which the section contemplates. Section 373 has been the subject of very careful consideration by the Madras High Court with reference to the nature of the offence which is contemplated by it, and which is common to it with section 372. In that case, *viz.*, that of *Dowlath Bee* v. *Shaik Ali* (1), a person was tried charging him that he obtained possession of one Dowlath Bee, a minor under the age of 16, namely of the age of ten years, with intent that she should be used for an unlawful and immoral purpose, that is to say, for the purpose of illicit intercourse, and he was charged with having thereby committed an offence under section 373 of the Indian Penal Code. Chief Justice Scotland tried the case and referred it to the Court for opinion, and stated that he was inclined to the opinion that the section applied only to a case of buying and hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing or using her habitually for the purpose of indiscriminate sexual intercourse with man, or in some unlawful and immoral course. Upon the case being heard by the Court, Chief Justice Scotland said that a very careful consideration of the section under which the prisoner had been found guilty had removed his doubts and confirmed the opinion he had formed before the trial as to "its proper construction," &c. He said, "To bring a case within the section, it is in my opinion essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession, whether ostensibly for a proper purpose or not." He goes on to say that the provisions as to the intent or knowledge of its being likely that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, indicating plainly as it does "an employment or use of the minor at some time future to the obtaining of

(1) 5 Mad. H. C., 473.

possession," is in his mind strong to show that complete possession and control of the minor's person obtained by buying, hiring, or otherwise, with the intent or knowledge that, by the effect of such possession and control the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision, he says, appears to him to exclude the supposition that obtaining of possession in the sense in which that expression is no doubt sometimes used, of merely having sexual connection with a woman, could have been in the contemplation of the framers of the section. He then goes on to say, referring still to the purposes of the section:—"With respect to the further point of the meaning of the words 'for the purpose of prostitution', which it has been necessary to consider in deciding this case, I have a clear opinion. Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that, I think, is required. The ordinary and commonly understood meaning of the word 'prostitution' is the offering of the person for promiscuous sexual intercourse with men, and that, I think, must be taken to be its meaning in the section, there being nothing in the context opposed to it, but rather the contrary. The words 'employed or used' strike me as confirmatory of that being the only meaning intended. If these words had been followed by the words 'as a prostitute,' no doubt could have arisen, and I see no indication that anything different was meant by the words 'for the purpose of prostitution.' Further, it is a weighty consideration in support of this construction, as well as of that given to the first part of the section, that, if not right, there would be no stopping short of holding every man to be punishable under section 373 who had casual sexual intercourse with a willing girl under the age of 16, capable of giving consent, or kept her as his mistress or concubine, even although the girl had been a common prostitute before he associated with her. Such an effect could not possibly have been intended." The severity of the punishment provided by the section seems alone almost conclusive as to the justice of this opinion.

In the case of the *Queen* v. *Nourjan* (1) cited by the learned Standing Counsel, Mr. Justice Jackson says that

(1) 6 B. L. R., Ap. 34; 14 W. R. Cr., 39.

BENGAL SECRETARIAT LIBRARY

1893

QUEEN-EMPRESS v. SUKEE RAUR.

"that which section 372 contemplates is the selling, letting to hire, or otherwise disposing of, any minor with intent that such minor should be employed as stated, that is to say, making her over to a person either in perpetuity or for a term for a consideration, or otherwise transferring the possession of a minor." In that case the learned Judges differed. Mr. Justice Jackson found that there had been no "disposal" by one prisoner and no "obtaining possession" by the other. Mr. Justice Glover treated what he held to have been done as amounting to a "disposal" of the girl by the mother, and to "obtaining possession" of her by the brothel-keeper, differing from his colleague in this respect, but not in holding that the purpose for which the disposal and the obtaining possession were committed, must, under the section, be the devoting of the girl to the practice of prostitution.

Now, in this case what occurred was this, that the Reverend complainant, desiring to secure the punishment of the defendants under this section for the acts which, according to the informations, they avowed, communicated with the defendants, and as a result the girl, in this case a young prostitute, as she appears to be from the evidence, who lives with the accused No. 1, was brought by the accused No. 1 to the house of the accused No. 3 (as had been done for the use of another person on a previous occasion) for the use, as was supposed, of Mr. M. on that occasion, as a person who was desirous of having sexual intercourse with her. There was a talk apparently about a sale, and about a longer employment of the girl than merely for the one occasion, but it was only spoken of; the girl was neither sold nor hired out for a period of employment, and it certainly was not in the contemplation of any one that she should be sold or hired out for the purpose of being employed by the purchaser or hirer as a prostitute, or being disposed of by that person for that course of life. The only offence, if any, committed, was in bringing the girl to the house, in order that she might have an immoral interview with the supposed customer on that one occasion. For a short interview Rs. 5 was stated to be the charge, and that was the sum paid.

It appears to me quite clear that, upon the authorities quoted above, the commission of an immoral act of sexual intercouse at an interview so brought about is not in the contemplation of the section, and that had the accused been put upon their trial, and

had all the evidence that appears upon the depositions been laid before the jury, I should have been bound to tell them that they could not convict upon that evidence under section 372; and I say that, accepting the supposition that the evidence recently taken as to the age of the girl, of which there was none whatever upon the original depositions, can properly be incorporated under section 219 with the other depositions.

I am asked also to allow a charge of abetment of rape to be entered, founded, when coupled with the Age of Consent Act, upon that additional evidence—evidence which was taken only the day after the Sessions had commenced, and after I had drawn attention to the fact that the original depositions contained no evidence of age whatever. I do not think it would be right for me to include a charge of abetment of rape, or under the circumstances to apply the evidence taken upon a charge under one section to a wholly different one. I therefore direct that an entry be made to the effect that the charge is unsustainable, and such an entry will have the effect that the proceedings will be stayed. The prisoners must be discharged from custody.

Accused discharged.

Solicitor for the Crown: *The Government Solicitor* (Mr. *W. K. Eddis*).

T. A. P.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

MURRAY (APPELLANT) *v.* THE QUEEN-EMPRESS (RESPONDENT).*

1893 *June* 28.

Compounding offence—Requisites for composition of offence valid in law—Criminal Procedure Code (Act X of 1882), *s.* 345—*Onus of proof—Wrongful restraint and confinement of coolies employed on tea garden.*

Where an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the

* Criminal Appeal No. 488 of 1893, against the order passed by H. Boileau, Esq., Deputy Commissioner of Jalpaiguri, dated the 7th of June 1893.

1893

MURRAY v. THE QUEEN-EMPRESS.

Criminal Courts to try it, the *onus* is on him to show that there was a composition valid in law.

M, a European British subject charged with the compoundable offences of wrongful restraint and wrongful confinement of coolies employed on a tea garden of which he was the manager, pleaded that the Magistrate had no jurisdiction to try the cases as they had been compounded by the complainants. The alleged compromise consisted in a Bengali paper, signed by the coolies, stating that they "made *razinama*" (compromise) "of the case of their own accord," and a paper in English signed by *M*; these papers being given to the District Superintendent of Police, who had investigated the complaints, and who stated that he asked the coolies as to the contents of the Bengali paper, and they said that they had signed it voluntarily and stated its purport, and that one of them said in the presence of the others that it was a *razinama*. *G*, one of the coolies, also wrote on the paper the words in Uriya, "I will not carry on the case." The Bengali paper was written by the darogah of the police station in the presence of *M*. The paper signed by *M* was as follows:—"I hereby agree with these Ganjam people that there shall be no legal proceedings of any kind taken against them with the exception of those who have not completed their agreements. Those whose agreements have not been completed, proceedings will be taken against them on 22nd May, if they have not returned to the garden before then." Neither of the papers were explained to *G* so as to make them intelligible to him, for though the Bengali paper was read out, *G* did not understand that language. *G* was one of the coolies who had completed his agreement with *M*.

Held per PRINSEP, J.:—The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification to act as an inducement for his desiring to abstain from a prosecution; here there was no forbearance on the part of *M* to proceed against *G*, who had served out the term of his engagement, and, therefore, there was no consideration for the agreement to compound. Having regard, moreover, to the ignorance and inferior intelligence of *G*, it was of vital importance for *M* to show what led to the alleged agreement, and how it was that the darogah was instrumental to it, which he had not done.

Per TREVELYAN, J.:—Compounding an offence supposes an arrangement by which the parties have settled their differences, and in the more usual acceptation of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue: and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. Having regard to the fact that the writer of the Bengali

agreement had not been called, and that the contracting parties were, on the one side, ignorant coolies, strangers to the land, and to the language in which the document was written, and on the other, a European of some education, assisted by his Bengali clerk, and having also the assistance of the police, it was not proved that *G* knew what he was about and was fairly contracting.

Held, therefore, by the Court that there was under the circumstances no compounding of the offences with which *M* was charged, valid in law such as to deprive the Magistrate of jurisdiction to try them.

THE accused in this case, Mr. G. Murray, Manager of Rangamati Tea Estate belonging to the North Sylhet Tea Company, was charged with having at Rangamati wrongfully restrained Uriya coolies Gobindo and Mukundo, and thereby committing an offence under section 341, Penal Code, and with having on or about the month of February 1892, at Rangamati, wrongfully confined one Govindo, and thereby committing an offence under section 342, Penal Code.

The facts were that on the 12th May 1893, several Uriya coolies who had been employed on the Rangamati Tea Estate, but were then working on Munglass Tea Estate, came to Ja'paiguri with the manager of that garden, and lodged a written complaint.

This complaint is signed by about 50 coolies. It was alleged in the petition that a large number of Ganjam coolies had been recruited by Messrs. Finlay, Muir and Company, the Agents in Calcutta, and sent up to Rangamati to work in 1890 or 1891. Agreements under Act XIII of 1859 had been taken from them, and they had been subjected to much hardship, having been forcibly detained within wire fences and prevented from leaving the garden. This petition was made over to the District Superintendent of Police for investigation, and he went to the spot, and his report disclosed that Mr. Murray had been committing the offences under sections 341 and 342, Penal Code, with which he was charged.

The accused pleaded not guilty, but also pleaded that the offences had been compounded by the following documents (Exhibits 1 and 2) which had been given to the District Superintendent of Police:—

EXHIBIT 1.—"We, Gobind Uriya, Godai Uriya, Mukund Uriya, and Bonomali Uriya, who have brought a case against Mr. Murray, charging

1893

MURRAY v. THE QUEEN-EMPRESS.

him with wrongful assault, make *razinama* of the case of our own accord. We will not proceed with the case, and Mr. Murray also shall not be competent to institute any criminal suit against us.

(Sd.) MUKUNDO SARDAR (illegible).
(Sd.) BONOMALI (in Uriya).
(Sd.) GODAI URIYA (in Uriya).

The 15th May 1893.

In the pen of Bharat Chundra Gupta (in Bengali) I will not carry on the case. I sign (in Uriya)."

EXHIBIT 2.—"The North Sylhet Tea Company, Limited, Rangamati, 15th May 1893. I hereby agree with these Ganjam people that there shall be no legal proceedings of any kind taken against them with the exception of those who have not completed their agreements. Those whose agreements have not been completed, proceedings will be taken against them on the 22nd May, if they have not returned to the garden before then.

(Sd.) G. MURRAY."

As to the alleged compounding the Magistrate, the Deputy Commissioner of Jalpaiguri, observed in his judgment—

"He also raised a plea that his case had been compounded by the four persons principally concerned out of Court when the police enquiry was going on. He relied on exhibits 1 and 2, and Mr. Gouldsbury's evidence regarding them. He contended that it has been proved that exhibit 1 was voluntarily executed by the three persons whose names are attached; that they admitted to the District Superintendent of Police that they were aware of the contents of the document.

"It seems to me that this plea will not hold good. Govindo and Mukundo before the Court emphatically deny that they ever agreed to abandon the case. It is to be noted, too, that Mukundo's name as a matter of fact is not on the document, nor did he appear before Mr. Gouldsbury. The names are Salamdo Sardar, Bona Parel (? Bonomali), Godai, and the words in Uriya, '*mamlakuribu, hakim*,' marked with blue pencil. Govindo in cross-examination said this was his signature. Also it is extremely doubtful if Govindo knew the contents of the document. Mr. Gouldsbury is not certain that it was read out and explained to him. It is written in Bengali, a language of which he is ignorant. The conditions or terms of the composition also are not such as the persons affected would have accepted, had they understood them. The terms are much as follows:—'If you will cease from this prosecution, I (Mr. Murray) will not prosecute you, but I will prosecute those coolies who do not return by 22nd May.'

"As a matter of fact Mr. Murray could not prosecute these men; he had no grounds upon which to do so; and it was grossly unfair to say to these

ignorant men, who have in a measure been his bondsmen for two years or more, I will not prosecute you. On the other hand, they (the coolies) had strong grounds on which to proceed against Mr. Murray, as is shown by the evidence on the record.

"I must say, however, that had the deed of composition been a fair one, giving mutual concessions which were understood and agreed to by both parties, I am not at all sure but that the contention of the learned Counsel would have been successful.

"Another point is whether the case having once commenced, a composition entered into at a previous stage and now denied by one of the parties to it, could be put in so as to oust the jurisdiction of the Court. The law is not clear on this question; as matters are, I hold that the case has not been properly compounded."

Eventually the Deputy Commissioner found Mr. Murray guilty of offences under sections 341 and 342, Penal Code, and sentenced him for the first offence to a fine of Rs. 500, or in default to one month's simple imprisonment, and for the second offence to one month's simple imprisonment.

From this finding and sentence Mr. Murray appealed to the High Court on the following grounds:—

That the Deputy Commissioner ought to have held that Govindo and Mukundo, voluntarily and with full knowledge of its contents, signed a Bengali document agreeing to withdraw all proceedings against the petitioner; that the Deputy Commissioner ought to have held that Govindo and Mukundo had legally compounded the offences with which the petitioner was charged; that the Deputy Commissioner ought to have held that the said composition of the said offences had the effect of an acquittal of the petitioner in respect of the said offences; that the Deputy Commissioner ought to have acquitted the petitioner, whereas he wrongfully convicted him; and that, having regard to the said composition, the Deputy Commissioner ought to have held that he had no jurisdiction to call upon your petitioner to enter upon his defence.

He also submitted that in any case the sentence passed upon him, having regard to the circumstances of the case, was too severe.

Mr. *Henderson* for the appellant.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

Mr. *Henderson.*—The offences with which the appellant is charged are compoundable offences, and I submit that they have

1893

MURRAY v. THE QUEEN-EMPRESS.

been compounded: the Magistrate, therefore, had no jurisdiction to try the case, and the conviction is bad in law. The composition took place outside the Court, and when the trial came on, the complainants denied having made it, and the case went on. It is submitted that the composition is a valid one: there is no evidence that the complainants compounded under threats or fear. [TREVELYAN, J.—There is another question whether "compounding" an offence under section 214 of the Criminal Procedure Code does not mean receiving money: that is the meaning attached to it in England; for instance, a man is charged with assault, and the complainant says, "all right, I won't prosecute you;" that does not amount to compounding, but if he receives money for not prosecuting, the case would be different.] I submit that a composition of an offence is a contract, and it may be entered into without any money consideration. The Magistrate raised another point, whether an offence could be compounded out of Court. I contend that a composition is a contract and may be made at any time; no money consideration is necessary. It might happen that the prosecutor was a person of position and wealth, and in such a case he would probably think it beneath his dignity to accept money. [PRINSEP, J.—It must be remembered that in consequence of the case of *Regina* v. *Rahimat* (1), section 345 of the Criminal Procedure Code was enacted, and the proviso which was then appended to section 214 was repealed.] An agreement to compound may be made the subject of a civil suit. The point at issue here must be considered on the evidence of Mr. Goldsbury and on the documents evidencing the composition (Exhibits 1 and 2).

The *Deputy Legal Remembrancer* for the Crown contended that on the evidence in the case it was clear that the complainants had been compelled to execute the documents on which the allegation of the offences having been compounded was based, and he went into the evidence to show that this was the case.

The following judgments were delivered by the Court (PRINSEP and TREVELYAN, JJ.):—

PRINSEP, J.:—A very large number of coolies, more than 90 in number, made a complaint, of a somewhat general character,

(1) I. L. R., 1 Bom., 147.

of various kinds of ill-treatment against the manager of the tea garden at Rangamati, in which they were under engagement to work. The Magistrate thereupon directed the District Superintendent of Police to hold an enquiry into these matters. The District Superintendent of Police accordingly proceeded to the tea garden and reduced the statements of the principal parties complaining into definite form, disclosing complaints of wrongful restraint and wrongful confinement. On his report the Magistrate summoned a large number of persons, some of whom only attended, and he eventually convicted George Murray, the manager of the tea garden, of wrongful restraint and wrongful confinement, and he has sentenced him for the former offence to a fine of Rs. 500, or in default, to one month's simple imprisonment, and for the latter, to one month's simple imprisonment.

An appeal has been made direct to this Court by the accused, George Murray, who is a European British subject. The learned Counsel who appears for the appellant does not attempt to object to the findings of the Magistrate, or that they are not in accordance with the evidence. Indeed, the examination of the accused, George Murray, before the District Magistrate amounts to a confession on his part. But the learned Counsel contends that the Magistrate was without jurisdiction, inasmuch as the two persons Gobind and Mokund, against whom the offences of which the accused has been convicted were committed, had compounded those offences in the presence of the District Superintendent of Police after his investigation had been completed, the offences being compoundable under section 345, Code of Criminal Procedure. The learned Counsel also contends that the sentences passed are inappropriate by reason of their severity.

The District Magistrate, in convicting George Murray, the Manager of the Rangamati Tea Garden, has found that he wrongfully restrained the coolies employed in that garden by surrounding the lines in which they resided with a barbed wire fence of about 3 feet in height, securing the exit from that enclosure by guards regularly posted. He has also found that under orders of the Manager, George Murray, Gobind, one of the coolies, was for two or three days confined within a shed on the premises, locked from the outside. The excuse alleged for such ill-treatment is the

1893

MURRAY v. THE QUEEN-EMPRESS.

absconding of a large number of coolies employed in this tea garden, and the necessity for preventing others also from running away. The evidence shows that practically the coolies employed on this tea garden were always in a state of duress. When off work they were kept within the guarded enclosure, and even when they were at work on the tea garden they were watched by guards. It appears even that they were not allowed freedom to go to the bazar when not at work,—at least without special permission, and then only under certain conditions. It is alleged that Gobind was arrested outside the premises, when, as he says, he was about to go to the bazar. But, on the other hand, it is stated that he was then attempting to escape. He was taken before the Manager (Murray), and under Murray's order he was locked up in what is called the tin house, a shed about 10 feet by 10 feet, for several days. The justification attempted for the conduct of the Manager is altogether unreasonable. He apparently arrogated to himself absolute control over the coolies employed on the tea garden so long as the engagements which they had entered into to work in the garden continued, in such a manner as completely to deprive them of any freedom of action, and he thus practically reduced them for the term of their engagements to a state of slavery. Such conduct cannot be too strongly condemned, and if, as it is suggested, it exists in other tea gardens, it must render the persons adopting it liable to the severe penalties of the law. It is only under certain circumstances that the law (Act XXI of 1883) permits the employer of labourers under engagements to work for a specified term who may abscond from such service to arrest them, and even in that case, certain conditions are prescribed. Under no circumstances is it justifiable to subject labourers to restraint against their declared wishes in order to prevent the possibility of escape. It is hardly necessary to add that the law does not permit any employer of labourers under such engagements to subject them to confinement for any alleged misconduct. The accused states that he was not aware that he was acting contrary to law. That is no valid excuse. It is to be observed that he is above 30 years of age, and has been about six years in this management. So far, therefore, as to the severity of the sentence, we think that there is nothing to be said. We observe, however, that the sentence for

wrongful restraint under section 341, Penal Code, so far as it directs that in default of payment of fine the accused shall suffer one month's simple imprisonment, is excessive, being beyond the limit provided by law, *viz.*, one week (see section 65, Penal Code).

Great stress has also been laid on the delay in making this complaint. It appears that the petition was made to the Magistrate about one month after Gobind and Mokund had left the Rangamati tea garden, on expiry of their engagements, and that the confinement of Gobind, of which the Manager, George Murray, has been convicted, took place more than one year before that time. This delay is in our opinion sufficiently explained. In some measure it was due to the restraint to which the petitioners were subjected, and it would seem that the more recent delay of one month in making the complaint after the coolies had obtained their freedom was due to their disinclination to press the matter until they had learnt that the manager was about to take proceedings in the Criminal Court against them. We have little doubt that the helpless condition of these ignorant coolies, who were in a strange part of India at a considerable distance from their homes and amongst strangers who speak a different vernacular, sufficiently explains the difficulties of their position, their reluctance to complain, and the delay in making any complaint of ill-treatment.

It does not appear, nor is it even suggested, that they ever had a reasonable opportunity of complaining, and this is a matter of some surprise, as I am under the impression that under the orders of Government some system of inspection and supervision is in force. If I am misinformed, the facts elicited in this case show the necessity for some system of periodical inspection so as to give labourers, who may desire it, an opportunity to bring such matters as are made the subject of trial in this case to the notice of those whose duties it is to afford protection and redress.

It becomes necessary, therefore, to consider only whether Mokund and Gobind, against whom the offences were committed, did lawfully compound those offences so as to have deprived the Magistrate of jurisdiction to hold this trial. No doubt the offences of which the appellant has been convicted are offences which

1893

MURRAY v. THE QUEEN-EMPRESS.

can be lawfully compounded by the person restrained or confined. Mr. Gouldsbury, the District Superintendent of Police, states that a Bengali paper was given to him by three persons who had signed it, a fourth person whose name was attached to it who, he thinks was Bonomali, being absent; that he asked these persons as to its contents in order to ascertain whether they had signed it voluntarily; that they stated that they had signed it voluntarily and stated its purport; that an English document was simultaneously given to him; that Gobind was one of the persons present, and that Mokund, the other complainant in this case, was not present. He identifies these two papers which are on the record, and he states that, so far as he can remember, he had the Bengali document read out by a writer-constable, but his recollection is not certain. These papers were presented to Mr. Gouldsbury at Sipaobari, at some distance from the Rangamati tea garden. He adds, that one of the men stated in the presence of the other that it was a *razinama*, that is, a compromise. Gobind admits that he wrote some words at the foot of the Bengali paper which was presented to Mr. Gouldsbury. These words are, "I will not carry on the case" He clearly referred by these words to the complaint which had been made by him and which had just been under investigation by the District Superintendent of Police. There can be no doubt, notwithstanding his equivocation, that he was one of the persons who presented the paper to Mr. Gouldsbury.

The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution, and the law (section 345, Code of Criminal Procedure) provides that if the offence be compoundable, a composition shall have the effect of an acquittal. In the case before us it is for the accused, who raises an objection to the jurisdiction of the Magistrate, to show that there was a composition valid in law. Here the alleged composition is contained in the two papers given to the District Superintendent of Police. The Bengali paper purports to come from the complainant and other coolies, and it should be recollected that he cannot read or write Bengali. When Gobind gave evidence a few days later to the Magistrate, it seems clear that he had no

intention to withdraw his complaint. The question is, therefore—Do his acts to the District Superintendent of Police, Mr. Gouldsbury, amount to the intimation of a compounding of the offence under investigation on his complaint so as to deprive the District Magistrate of jurisdiction to hold the trial? An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be by intimation to the Magistrate holding the trial, and is permissible only in a summons case, and the complainant is required in such a case to satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw it (section 248, Code of Criminal Procedure). The offence of wrongful confinement is not a summons case but a warrant case, and the law does not provide for the withdrawal of such a case by the complainant, and the District Magistrate records that he is ignorant of Bengali. It is in the following terms:—(reads exhibit 1 *ante p.* 105). The last words "I will not carry on the case" are in the handwriting of the complainant Gobind. They are written in Uriya, the words of the paper being in Bengali.

The English paper simultaneously presented is in the handwriting of the accused Murray and signed by him. It is in the following terms:—(reads exhibit 2 *ante p.* 106).

The District Magistrate finds—and we agree with him—that the contents of the Bengali paper were not read out and explained by Mr. Gouldsbury to Govind so as to make them intelligible, for he records that Bengali is a language of which he, the complainant, is ignorant. It is not stated that the English paper was ever explained to Gobind It is, therefore, impossible to find that the nature of the agreement under which the composition was settled was ever made intelligible to Govind, who is a rude and ignorant cooly coming from the Ganjam district on the further side of Orissa and within the Madras Presidency. It is also very remarkable that there is little or no evidence of the circumstances under which this agreement to compound was arrived at. The accused Murray in his examination states that the Bengali paper was written by the Damdin Darogah, that is, by the Police officer of the police station of the locality of the tea garden. Govind's examination shows that the accused Murray was then present. But in other respects there is no evidence, so that we have no means

1893

MURRAY v. THE QUEEN-EMPRESS.

of knowing what led to the alleged agreement, and how it was made or why the darogah was instrumental to it. Having regard to the ignorance and inferior intelligence of the cooly Gobind, this was of vital importance, and this the accused, if he relied on the compounding, was bound to show. The gratification alleged to induce Govind to compound was a forbearance on the part of Murray to institute criminal proceedings, not against him (for he had served out the time of his engagement), but against other coolies who had absconded and had thus broken their engagements to labour for the tea garden, provided that they returned to work by a particular date. It is not easy to understand how such forbearance towards others of only a few days could have had such an influence on Govind. We should certainly not feel justified in accepting such uncertain and vague evidence to operate as barring the Courts of Justice to a person of the position and ignorance of the cooly Govind, whose acceptance of their terms is contradicted, prosecuting his complaint without any hesitation a few days afterwards. It is impossible to accept the evidence on the record as sufficiently clear to satisfy us that there was a deliberate act of compounding on the part of Govind, and we accordingly disallow this objection.

The other complainant, Mokund, is not proved to have been one of those who were present before Mr. Gouldsbury. He states that he signed the Bengali paper because the *sahib* (Murray) told him to put his name to it, but that it was not read to him; and he adds that there was no talk of withdrawing the case. Therefore, so far as Mokund is concerned, it is not proved that he ever consented to withdraw his complaint, and there is certainly nothing to show that he consented to any arrangement amounting to a composition.

For these reasons I am of opinion that there is no compounding such as would deprive the Magistrate of jurisdiction.

The sentence under section 341 must be amended to one of fine of rupees 500, or in default to one week's simple imprisonment. The other sentence is appropriate, and the appeals must be dismissed.

TREVELYAN, J. :—I agree with Mr. Justice Prinsep. On the question of composition it is for the accused to prove that the offence was compounded, and that therefore the trial ought not to

have proceeded. Compounding an offence is more than a mere promise to withdraw a prosecution. It supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition.

In this case the person who drew out the document, namely, the Damdin Darogah, has not been called. The contracting parties are, on the one side, ignorant coolies, strangers to the land and to the language in which the document is written; on the other, a European, probably of some education, assisted by his Bengali clerk. Mr. Murray had also the assistance of the Police. There is no doubt that the document was drawn by the darogah. The darogah has not been called. The omission to call him is, to my mind, a circumstance of the strongest suspicion. I cannot help thinking that if it had been possible that his evidence would have supported the story of a *bonâ-fide* arrangement, he would have been called. In making this observation I have regard to the fact that the *onus* on the question is on the accused. Where the burden is on the prosecution, it is rarely right to comment on the omission of the accused to call evidence. It is perfectly true that Govind has written on the paper that he will give up the prosecution. This by itself is not enough. We are in reality entirely in the dark as to the circumstances under which that document came to be written, and it is contradicted by the fact that Govind appeared soon after before the Magistrate and readily prosecuted his case.

The defence relies on Mr. Gouldsbury's evidence; but I do not think that Mr. Gouldsbury's evidence by any means shows that these men knew what they were about and were fairly contracting. Mr. Gouldsbury may have been satisfied as to this; but it is for the Court to arrive at a conclusion on this question.

I entirely agree in thinking that it has not been proved that there was any composition such as to exclude the jurisdiction of the Court.

1893

MURRAY v. THE QUEEN-EMPRESS.

The alternative sentence of imprisonment is, as Mr. Justice Prinsep has pointed out, illegal. With that exception, I think that the punishment inflicted is by no means excessive.

The Magistrate has taken into fair and full consideration all the circumstances said to be in mitigation which were urged before him. The same arguments have been addressed to us. I cannot assume that the manager of a tea garden, aged 31, has so little education that he considers that he is entitled to treat his fellow-subjects like cattle, to let them go and come only at his will, and at his pleasure to sentence them to imprisonment.

Mr. Murray has endeavoured to reduce his coolies to a state of slavery. He ought to have known that slave-holding in any form is repugnant to every right-minded British subject. I do not think that there are any mitigating circumstances. I think the fact that he used barbed wire for imprisoning these wretched men much aggravates his case. The effect, if not the object, of using wire of this kind would be to injure coolies trying to leave the coolie lines.

In my opinion this appeal should be dismissed. The circumstances of this case go to show the necessity for efficient inspection of tea gardens. It is intolerable that the accused should have been permitted without prosecution to act as he had done for so long a time.

Appeal dismissed.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1892 *July* 26.

JUGUL KISSORE LAL SING DEO (PLAINTIFF) *v.* KARTIC CHUNDER CHOTTOPADHYA AND OTHERS (DEFENDANTS).*

Parties—Suit by mortgagee and sale in execution of mortgage decree—Grant of putni by mortgagor—Putnidar—Right of redemption—Notice—Constructive notice—Transfer of Property Act (IV of 1882), *ss.* 3 *and* 85.

A mouza, K, was mortgaged by *D* by bonds extending from 1867 to 1879, the last bond of 5th January 1879 including the amounts borrowed on the

* Appeal from Original Decree No. 213 of 1891, against the decree of Babu Brojendro Coomar Seal, District Judge of Bankoora, dated the 20th of April 1891.

former bonds. On 7th January 1872, whilst it was so under mortgage, the same mortgagor *D* executed bonds whereby he mortgaged K to the defendants, and in suits brought on the basis of those bonds, came to an amicable settlement with the defendants by which on 25th February 1879 he settled K in *putni* with them; the *bonus* for the *putni* going to satisfy the mortgage debts. In 1885 a suit, to which the present defendants were not made parties, was brought by the mortgagees of the bond of 5th January 1879, and in execution of the decree in that suit, K was put up for sale and purchased by the plaintiff on 21st June 1886. In a suit brought in 1890 against the defendants to set aside the *putni* and for *khas* possession of K, it was found that the plaintiff had notice of the *putni*. *Held*, that the defendants as *putnidars* had an interest in K within the meaning of section 85 of the Transfer of Property Act, and should therefore have been made parties to the suit in 1885, and thereby given an opportunity of redeeming the mortgage on which that suit was brought.

Kokil Singh v. *Duli Chund* (1) and *Kasimunnissa Bibee* v. *Nilratna Bose* (2) referred to.

If not as *putnidars*, they were entitled as second mortgagees to have an opportunity of redeeming the prior mortgage and to be parties to that suit. Not having been parties, the plaintiff was not entitled to khas possession as against them.

Nanack Chand v. *Teluckdye Koer* (3), *Dirgopal Lall* v. *Bolakee* (4), and *Radha Pershad Misser* v. *Monohur Das* (5) referred to.

THIS was a suit for khas possession of mouza Khandari after setting aside a *putni* which Kartic Chunder Chottopadhya (defendant No. 1) and the predecessors of the other defendants had obtained on 14th Falgoon 1285 (25th February 1879) from Dhurm Sing, the former proprietor of the zamindari.

For the purposes of this report the facts of the case and the contention of the parties sufficiently appear from the judgment of the High Court.

Baboo *Srinath Dass* and Baboo *Upendro Chunder Bose* for the appellant.

Baboo *Saroda Churn Mitter* for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

This appeal arises out of a suit brought by the appellant to recover *khas* possession of a mouza named Khandari, included in

(1) 5 C. L. R., 243.
(2) 1. L. R., 8 Calc., 79.
(3) I. L. R., 5 Calc., 265; 4 C. L. R., 358.
(4) I. L. R., 5 Calc., 269.
(5) I. L. R., 6 Calc., 317.

1892

JUGUL KISSORE LAL SING DEO v. KARTIC CHUNDER CHOTTOPADHYA.

zamindari *kismut* Saharjora, after setting aside a *putni* obtained by defendant No. 1 and the predecessor of the remaining defendants, on the 14th Falgun 1285 (25th February 1879), from the former proprietor of the zamindari. The plaintiff in his plaint states that the late Dhurm Sing Baboo, by a bond dated the 8th Assar 1269 (21st June 1862), mortgaged the said *kismut* Saharjora and another property to one Gadadhar Banerjee, as security for a loan of Rs. 11,000; that on the 25th Cheyt 1278 (8th April 1872) he again executed another bond in favour of the representatives of the said Gadadhur Banerjee for Rs. 8,000, being partly the balance due on the previous bond, and partly a fresh loan on the mortgage of the same properties; that on the 22nd Pous 1285 (5th January 1879) Bunwari Lal Sing, a representative of Dhurm Sing, executed a third mortgage bond in favour of the said representatives of Godadhur on the same security, for the debt covered by the last-mentioned bond and other debts; that in execution of the decree obtained on this third bond, the mortgaged properties were put up to sale and purchased by the plaintiff on the 8th Assar 1293 (21st June 1886); that while the said zamindari was thus under mortgage, Dhurm Sing mortgaged mouza Khandari and another mouza to the defendants, or their predecessors, by three instalment bonds, dated the 24th Pous 1278 (7th January 1872), and upon suits being brought on the basis of these instalment bonds, the said Bunwari Lal Sing, representative of Dhurm Sing, made an amicable settlement with the defendants or their predecessors on the 14th Falgun 1285 (25th February 1879), whereby he settled mouza Khandari in *putni* with them, the *bonus* for the *putni*, Rs. 9,000, going to satisfy the mortgage debt; and that as this *putni* was granted whilst mouza Khandari was under mortgage, the plaintiff as purchaser in execution of the mortgage decree is entitled to set it aside and recover *khas* possession.

The defendants in their written statement denied that any money on account of the bond of 1269 (1862) was included in the bond of Cheyt 1278 (February 1872), and they urged that their bonds of Pous 1278 (January 1872) were on account of a debt secured by an earlier mortgage bond, dated 13th Assin 1267 (28th September 1860); that they were, therefore, entitled to priority over

the mortgages set up by the plaintiff; and that, as they were no parties to the suit which resulted in the decree in execution of which the plaintiff made his purchase, they were not bound by the auction sale, and the plaintiff was not entitled to recover *khas* possession as against them.

Upon these pleadings the Court below framed several issues, and it has held that the mortgages set up by both parties are genuine and valid; that the defendants are entitled to priority by reason of the mortgage of 1267 (1860); and that the plaintiff is not entitled to recover *khas* possession. And it has further held that either as *putnidars*, or second mortgagees, the defendants were entitled to be made parties in the suit brought by the representatives of Godadhur Banerjee; and that as they were not made parties, they were not bound by the decree in that suit, or any proceedings that might have been taken in that suit, or by the sale in execution of that decree.

Against that decision the plaintiff has preferred this appeal; and it is contended on his behalf, *first*, that the Court below was wrong in holding that the mortgages of the 24th Pous 1278 (7th January 1872) were on account of debt secured by the prior mortgage of 1267 (1860); *secondly*, that the Court below was wrong in holding that the defendants were entitled to be made parties to the suit brought by the Banerjees; and *thirdly*, that the Court below ought in any case to have apportioned the mortgage debt over mouza Khandari, and given the plaintiff a decree for possession on default of the defendants to pay off the amount so apportioned instead of dismissing the suit altogether.

If it had been necessary to decide the first point, then, notwithstanding certain defects in the evidence noticed by the learned Judge below, we should, on the whole, have agreed with him in the conclusion he has arrived at; but in the view we take of the case upon the two remaining points, we think it unnecessary and undesirable to dispose of this question in this suit. Upon the second point, we think the plaintiff must fail. At the date that the Banerjees brought their suit upon their mortgage (1885), the defendants had been for some years in possession of the mouza, which was part of the mortgaged premises, as *putnidars;* and their *putni* was created in satisfaction of mortgages which, if

1892

JUGUL KISSORE LAL SING DEO v. KARTIC CHUNDER CHOTTOPADHYA.

there had not been such satisfaction would, irrespective of the question of priority, have given them at least the position of second mortgagees. The Banerjees were, therefore, in our opinion, clearly bound to make the defendants parties to their suit, under s. 85 of the Transfer of Property Act. As *putnidars* of part of the property comprised in the mortgage, they clearly had an interest in such property, within the meaning of that section, and were entitled to have an opportunity of redeeming. This view is in accordance with the decisions of this Court in *Kokil Singh* v. *Duli Chund* (1) and *Kasimunnissa Bibee* v. *Nilratna Bose* (2). And if as *putnidars* they were not necessary parties, it would clearly be inequitable to hold that they were not entitled to fall back upon their position as second mortgagees, and claim the right to redeem the prior mortgage, if the *putni*, which went to satisfy the second mortgage, is to be held invalid as against the first mortgagee.

It was contended by the learned vakil for the appellant that the Banerjees had no notice of the defendant's interest as *putnidars* or second mortgagees at the date of their suit; and that they were therefore not bound to make the defendants parties to that suit. This argument, in our opinion, has no force. The notice required by s. 85 of the Transfer of Property Act need not be actual notice, but includes constructive notice, as defined in s. 3: and seeing that the defendants had been in possession of the mouza in dispute for some years before the date of the suit of the Banerjees, there can be no room for doubt that they had such constructive notice.

Whether the defendants are prior mortgagees or not, they having obtained possession first are entitled to retain it as against the plaintiff in this suit, see *Nanack Chand* v. *Teluckdye Koer* (3), *Dirgopal Lall* v. *Bolakee* (4), and *Radha Pershad Misser* v. *Monohur Das* (5).

It now remains to consider the third point urged before us. We think it sufficient to say upon this point that the frame of the suit precludes the plaintiff from claiming the relief which he has asked us to give him now, and that the mere insertion of a general

(1) 5 C. L. R., 243.
(2) I. L. R., 8 Calc., 79.
(3) I. L. R., 5 Calc., 265; 4 C. L. R., 358.
(4) I. L. R., 5 Calc., 269.
(5) I. L. R., 6 Calc., 317.

prayer clause in the plaint is not sufficient for the purpose. Having regard to the pleadings in the case, and to the terms of the several bonds that have been put in by the parties, we think the plaintiff has not placed before the Court sufficient materials to enable it to apportion the mortgage debt on the mouza in dispute. There is no sufficient evidence to satisfy us as to how much of the mortgage debt covered by the bond of 1269 remained unpaid on the date of the bond of 1278. Nor is there any clear evidence to show what the relative values of the mouza now in dispute and the remainder of the mortgaged properties are.

1892

JUGUL KISSORE LAL SING DEO *v.* KARTIC CHUNDER CHOTTOPADHYA.

The result, then, is that appeal must be dismissed with costs.

Appeal dismissed.

C. D. P.

CRIMINAL REVISION.

Before Mr. Justice Prinsep, Mr. Justice O'Kinealy, and Mr. Justice Trevelyan.

DAMU SENAPATI AND SEVEN OTHERS (PETITIONERS) *v.* SRIDHAR RAJWAR (OPPOSITE PARTY).*

1893 *August* 17.

Criminal proceedings—Irregularity—Magistrate passing sentence before finishing his judgment—Criminal Procedure Code (Act X of 1882), *ss.* 365, 367 *and* 537.

A Magistrate on a charge of rioting passed sentence on the accused without delivering his judgment in open Court, the judgment (one in course of being written during the hearing of the case) being in fact not then completed. The case went on appeal to the Sessions Judge, who dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence.

Held, per PRINSEP and TREVELYAN, JJ., that the judgment of the Magistrate was not one in accordance with the law as laid down in section 366 of the Criminal Procedure Code: but *held* by PRINSEP and O'KINEALY, JJ. (TREVELYAN, J., dissenting) that the irregularity was one contemplated by section 537 of the Code, and not having occasioned any failure of justice, it did not necessitate a retrial of the case.

* Criminal Revision No. 370 of 1893, against the order of J. Pratt, Esq., Sessions Judge of Midnapore, dated the 5th of June 1893, affirming the order passed by Mr. M A. Kadar, Deputy Magistrate of Midnapore, dated the 12th of May 1893.

1893

DAMU SENAPATI v. SRIDHAR RAJWAR.

Per TREVELYAN, J.—The case was more than one of mere "error, omission or irregularity" within the meaning of section 537: the judgment having been irregularly arrived at and pronounced, there was no "judgment" in accordance with law, and therefore no fair trial to which every accused person is entitled: the case ought therefore to be re-tried.

THE material facts of this case sufficienlty appear from he petition filed by the petitioners, which showed—

"1. That one Sridhar Rajwar, the complainant, lodged a complaint on the 8th April 1883 in the Chandra outpost, on the allegation that he went with five coolies, under orders of one Prankristo Dey, a gomastha of Messrs. Watson & Company, to impound the cattle which might have entered the indigo fields belonging to the said Company at Bailasal and Moutalah, where they were assaulted by a body of 40 to 60 people, who rescued the cattle.

"2. That your petitioners also laid a complaint on the 8th September 1893, against Prankristo, the gomastha and *tagiddar*, and Arun Pal and others, on the allegations that they forcibly dragged him out of his house by order of Prankristo and assaulted him and his brother.

"3. That both the charges were investigated and eventually sent up by the police.

"4. That the Deputy Magistrate of Midnapore on the 12th May 1893, after recording the evidence of both sides, convicted your petitioners under section 147, Penal Code, without writing any judgment as contemplated by the Criminal Procedure Code, and sentenced them each to two months' rigorous imprisonment and a fine of Rs. 25; in default, further rigorous imprisonment for one month. They were also directed under section 106, Criminal Procedure Code, to execute each a personal recognizance of Rs. 100 to keep the peace for one year, or in default each to be simply imprisoned for one year.

"5. That the counter-charge brought by your petitioner was dismissed under section 253, Criminal Procedure Code, without writing any judgment, the Deputy Magistrate declaring that 'there will be no separate judgment,' though subsequently he delivered one.

"6. That the trial held by the Deputy Magistrate was very irregular and contrary to law, and showed a bias towards Messrs. Watson & Company's people, and ought therefore to have been set aside, as will appear from the affidavits of Damu Senapati filed before the District Magistrate on the 9th May 1893, and the application filed before the Deputy Magistrate, dated the 10th May 1893, attested copies whereof are annexed hereto.

"7. That, dissatisfied with the conviction and sentence passed by the District Magistrate of Midnapore, your petitioners preferred an appeal to the Sessions Judge of that place who, for the reasons recorded in his judgment, dated 5th June 1893, affirmed the said conviction and sentence."

The petitioners submitted that the conviction and sentence ought to be set aside, and the High Court (PRINSEP and TREVELYAN, JJ.) made an order in the following terms:—

"Let the record be sent for and a rule issue on the District Magistrate to show cause why the conviction and sentence should not be set aside and such other order passed as to this Court may seem fit, on the ground that no judgment has been recorded in accordance with the law, and that in binding down petitioners to keep the peace, the Magistrate has not exercised a proper discretion is respect of the term for which such recognizances have been required. Pending further orders of this Court, the petitioners will be enlarged on bail.

Mr. *Jackson*, Mr. *K. B. Dutt*, Baboo *Debendra Nath Ghose*, and Baboo *Jogesh Chunder Dey* for petitioners.

Mr. *Garth* and Baboo *Bhowany Churn Dutt* for the opposite party.

Mr. *Jackson*:—Our allegation is that the Magistrate never listened to the arguments of Counsel who appeared for the accused; whilst Counsel was arguing, the Magistrate was writing out his judgment, and he actually pronounced judgment and sentenced the accused to various terms of imprisonment before he had finished writing the judgment, and before he had signed and dated the judgment, as required by law: this is abundantly made out, not only by our affidavit, but also from the explanation submitted to this Court by the Magistrate. Section 366 of the Criminal Procedure Code lays down the mode of delivering judgment, and section 367 of the same Code states what the contents of a judgment are to be. The provisions of these two sections are imperative, and non-compliance with those provisions makes the whole trial irregular and absolutely illegal. [PRINSEP, J.—Was this objection taken on appeal?] The objection is taken in one of our grounds of appeal to the Judge. [PRINSEP, J.—The Judge on appeal deals fully with all the facts of the case; how, then, are you prejudiced by the irregularities you allege on the part of the Magistrate?] If the original trial is vitiated by the irregularities of which we complain, the appeal cannot put the matter *in statu quo*. We are entitled to a fair trial before the Court of first instance. [TREVELYAN, J.—I agree with you. If the Magistrate had heard

1893

DAMU SENAPATI v. SRIDHAR RAJWAR.

the arguments of Counsel who appeared for the accused, and had pronounced judgment after he had fully written it out, he might have acquitted the accused.]

Mr. *Garth, contra:*—It is not stated that these objections were urged before the Judge. The fact that the objections were taken in one of the grounds of appeal does not necessarily mean that they were pressed at the hearing. The Magistrate does not admit the allegations of the petitioners. [TREVELYAN, J.—It is pretty clear that the allegations are correct.] In any case, section 537 of the Criminal Procedure Code covers such a case.

Mr. *Jackson* in reply:—Section 537 does not cover all defects; certainly not defects in the procedure. It does not cover a case where there has been absolute illegality. See *Queen-Empress* v. *Chandi Singh* (1). It is clear there is a difference between acts of commission and acts of omission. Section 537 might extend to the latter class of cases, but by no means to the former, where there has been an intentional disregard of the provisions of the law. See *Queen-Empress* v. *Viraperumal* (2).

The Court (PRINSEP and TREVELYAN, JJ.) differed in opinion, and the case was referred to a third Judge (O'KINEALY, J.), who agreed with PRINSEP, J.

The following judgments were delivered:—

PRINSEP, J.:—In this case the rule was granted on the ground that *primâ facie* no proper judgment had been recorded in accordance with law by the Magistrate, raising the question whether in such a case a retrial should be had.

It appears that a retrial on a charge of rioting was conducted by the Magistrate at a somewhat unusual length, the prisoners being represented by Mr. K. B. Dutt, an advocate of this Court. Late in the day, the trial being completed, the Magistrate proceeded to deliver judgment. It is beyond doubt that at the time that he passed sentence on the accused he had not, in accordance with law, delivered his judgment by pronouncing it in open Court. When Mr. K. B. Dutt asked leave to read it, it was refused, but the judgment was read out to him by the Court Head-Constable under

(1) I. L. R., 14 Calc., 395. (2) I. L. R., 16 Mad., 105 (112, 113).

the orders of the Magistrate. At the end of the judgment, under the signature of the Magistrate, there is a note recorded in the following terms:—"At the request of the accused's Counsel, the judgment has been read over to him, by order of the Court, by the Head-Constable, Babu Lal Sukul, as it was being written out. M. A. Kadar, Deputy Magistrate." The explanation given by the Magistrate after the issue of the rule is not altogether consistent with this statement; but the terms of this note leave no doubt that when sentence was pronounced and the judgment was being read over by the Head-Constable under the direction of the Magistrate, it had not been completed. There can be no doubt that the judgment so pronounced is one not in accordance with sections 366 and 367 of the Criminal Procedure Code, and if the case had remained here, I should have been in favour of directing a fresh trial. It is impossible for any judicial officer, before a judgment has been finished, to be quite certain whether on a further consideration he will not arrive at a conclusion different from that originally formed, and it would be most dangerous to allow a sentence to be passed and a judgment setting out the reasons for the conviction and sentence to be afterwards written out. But the case did not remain in the Magistrate's Court.

An appeal was preferred to the Sessions Court.

No objection can fairly be raised against the judgment of that Court, which is full and complete, and deals thoroughly with the whole of the evidence taken at the trial as well as with the objections taken to the proceedings of the Magistrate. It does not appear, however, from that judgment that objection was taken to the manner in which judgment was recorded by the Magistrate. Whether such objection was or was not taken in the course of the argument is not certain. It is pointed out that this objection was taken in the petition of appeal presented to the Sessions Judge. I am not prepared to hold that because any objection may be set out in a petition of appeal, it was necessarily taken in the course of the argument before the Appellate Court; nor am I inclined to hold that it is the duty of an Appellate Court when the persons before it are properly represented, to do more than to consider the arguments raised at the hearing of the appeal; or that it is necessary for an Appellate Court, in addition to those arguments, to consider

1893

DAMU SENAPATI v. SRIDHAR RAJWAR.

what is also set out in the petition of appeal, so as to enable any party affected by its judgment to take advantage of any ground raised in the petition of appeal which is not referred to in the judgment delivered, and without showing to the satisfaction of the Superior Court that the particular objection was taken at the hearing of the appeal.

It appears from the judgment of the Sessions Judge on appeal that serious objections were taken by the learned Counsel for the appellants to the manner in which the trial was conducted, referring generally to the conduct of the Magistrate while evidence was being recorded. All those objections have been considered and disallowed by the Sessions Judge, who has expressed his regret that "allegations of unfairness and partiality should have been seriously made upon such trivial materials in respect of a Magistrate of long experience and unblemished reputation." Nothing has been said before us in respect of these remarks.

The question now remains for me to consider on this rule, whether, the case having been fairly tried out on the evidence on the record in the course of appeal, and the opinion of the Sessions Judge properly recorded in favour of the conviction of the appellants by order of the Magistrate, any irregularity in the manner of recording or delivering his judgment by the District Magistrate should be regarded as fatal to the trial so as to require a retrial. It seems to me that such an irregularity is one contemplated by section 537 of the Code of Criminal Procedure, and that in this case it has not occasioned any failure of justice. It is a matter of regret that such an irregularity on the part of the Magistrate should have occurred at all. Having regard to the lateness of the hour (which is stated to be 6-30 P.M.) at which the proceedings were concluded, the Magistrate would have exercised a better discretion if he had postponed the delivery of judgment until the following day. The irregularity having, in my opinion, occasioned no failure of justice, I would discharge the rule.

The other point raised in the rule was not made the subject of argument.

As I do not agree with TREVELYAN, J., the case must go to a third Judge to be appointed by the Chief Justice.

TREVELYAN, J. :—I agree with Mr. Justice Prinsep in thinking that the judgment of the Deputy Magistrate was not pronounced in accordance with the law. There can be no doubt from the note appended by the Deputy Magistrate to his judgment that sentence was given before the judgment was completed. There is also no doubt, from the explanation of the Deputy Magistrate, that he was writing his judgment when the argument was going on. It follows from this that he did not, as was his duty, attend to the argument of Counsel. The so-called judgment was therefore not arrived at in the way provided by law, and, as the learned Deputy Magistrate came to the conclusion without attending to the arguments of Counsel, it follows that the trial before him was not a fair one.

The question remains whether the action of the Deputy Magistrate was set right by the fact that the Appellate Court did its duty. I regret that on this question I am unable to agree in the conclusion arrived at by my learned colleague. I think that the terms of section 537, Criminal Procedure Code, are inapplicable to the present case. This is more than a case of a mere "error, omission or irregularity" in the judgment or proceedings. In my opinion there has been no judgment in accordance with the law. As I understand a "judgment," it means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments. As the Magistrate was doing other things at the time, there can have been no due consideration of the arguments, and the sentence seems to have been passed before, and not after, the consideration of the evidence. This course must in every case be unfair to an accused person. If it be unfair, it seems to me that he must be prejudiced by it. In my opinion there is not in substance much, if any, difference between the circumstances of this case and a case where the Magistrate declines to hear evidence or argument and sentences an accused person. As I understand the law laid down in the Criminal Procedure Code, every accused person is entitled to a fair and impartial trial and a judgment given in the way I have above suggested. A judgment ought to be given by a Magistrate who has had the witnesses before him. It is not sufficient that there be a judgment on paper evidence. In this case, as there pretends

1893

DAMU SENAPATI v. SRIDHAR RAJWAR.

to be a judgment of the first Court dealing with the facts, the mischief is, I think, greater than if there had been no judgment at all. An Appellate Court naturally, to a great extent, relies upon conclusions formed by Judges who have had the witnesses before them. Where the judgment of the first Court is arrived at in a way which the law does not recognize, the Appellate Court is misled, and the appellant is the more prejudiced.

If the fact that the Appellate Court has tried the case rightly, gets rid of a defect in the trial by the Court of first instance, it might equally be that a fair trial by the first Court would cure an unfair trial by the Appellate Court. I think that the accused is entitled to a fair trial by each Court.

In my opinion the conviction and sentence should be set aside and a new trial ordered.

O'KINEALY, J. :—In this case the petitioners were convicted by the Deputy Magistrate of Midnapore and sentenced; and in addition to that, they were bound down to keep the peace.

The petitioners appealed to the Sessions Judge; and he, on the 5th of June 1893, confirmed the conviction and sentence of the Deputy Magistrate.

On the 15th of June they applied to this Court, as a Court of Revision, and obtained the following rule. [After reading the rule (see *ante*, page 123) His Lordship continued]:—

In order to understand this rule, it must be borne in mind that the petitioners asserted that the Deputy Magistrate had convicted the prisoners before hearing the whole argument of the accused, and was writing his judgment during a portion of the argument. The rule, neither in terms nor in purport, refers to the trial which took place before the Court of Sessions. There would be some difficulty in setting aside the whole trial on the ground of irregularity in the Deputy Magistrate's Court, without setting aside the order of the Court of Sessions; but for this no rule was obtained. But apart from this, I think that the view taken of the case by Mr. Justice Prinsep is correct. I admit the great force in the view put forward by Mr. Justice Trevelyan in regard to the necessities of the Code being complied with; but, on the other hand, I am clearly of opinion that the irregularity in this case falls within

Chapter 95 of the Code of Criminal Procedure, and that this Court is precluded, by the terms of sections 537, from interfering with the orders of the Sessions Judge.

1893

DAMU SENAPATI *v.* SRIDHAR RAJWAR.

The rule is therefore discharged.

Rule discharged.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

HURRY RAM AND ANOTHER (DEFENDANTS) *v.* NURSINGH LAL AND OTHERS (PLAINTIFFS).*

1893 *May* 10.

Bengal Tenancy Act (VIII of 1885), s. 19—Ryot, definition of—Right of occupancy—Occupancy for horticultural purposes—Statutory right, effect on, of repeal of Act which gives it.

Where a right of occupancy had been acquired under the old Tenancy Act (VIII of 1869) which is repealed by the Bengal Tenancy Act (VIII of 1885), *Held*, that apart from the provisions of s. 19 of the latter Act, such right of occupancy was not forfeited by the repeal, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired.

Semble.—The definition of "ryot" in the Bengal Tenancy Act (VIII of 1885) is not exhaustive, and there is nothing in that definition which would exclude a person who had taken land for horticultural purposes.

THE facts of this case were as follows :—

The plaintiffs and their ancestors were the tenure-holders of 3 bighas 10 cottahs of land in mouzah Madubun, pergunnah Arrah, and had been in possession for upwards of fifty years. The land had always been used for horticultural purposes. On the 11th of June 1884 the plaintiffs leased the land on *shikmi* tenure to two under-tenants, and they held it under the plaintiffs till 1889. The defendants Nos. 2 and 3, the proprietors of the mouzah, endeavoured to enhance the rent, but without success. Eventually they got up a collusive pottah in the name of defendant No. 1, who instituted criminal proceedings against the plaintiffs'

* Appeal from Appellate Decree No. 1039 of 1891, against the decree of Babu Aubinash Chandra Mittra, Subordinate Judge of Shahabad, dated the 9th of April 1891, affirming the decree of Moulvie Ameer Ali, Munsiff of Arrah, dated the 30th of June 1890.

1893

HURRY RAM v. NURSINGH LAL.

two under-tenants, the *shikmi* holders. The Criminal Court, holding that the case involved a question of right, made an order placing the crops for the year 1889 in the hands of a third party, on whose application the crops were made over to the defendant No. 1, and he with the aid of the proprietor of the village took possession of the said land during the agricultural season of 1889. On the 27th of August 1889 the plaintiffs filed a suit to be reinstated and for mesne profits. Both the Lower Courts passed a decree in favour of the plaintiffs, and from the decision of the Lower Appellate Court the defendants appealed to the High Court.

Mr. *M. L. Sandel* for the appellants.

Babu *Saligram Sing* for the respondents.

Mr. *M. L. Sandel* :—The main points in this case which have been wrongly considered by the Courts below are—1st, there is nothing in the Bengal Tenancy Act (VIII of 1885) by which a person who holds lands for any purpose other than that of cultivation can acquire in it a right of occupancy; 2nd, the plaintiffs are not ryots as defined in that Act; 3rd, that as the plaintiffs are not ryots as defined by the Act, therefore section 19, which secures a right of occupancy acquired by a ryot before the commencement of the present Act, has no application to them. For these reasons the judgment of the Lower Court should be reversed.

Babu *Saligram Sing* for the respondents :—It is perfectly clear that under the old Act a ryot could hold land for horticultural purposes, and there is a distinct finding to that effect—*Chowdhry Khan* v. *Gour Jana* (1). In that case a ryot cleared jungle land and made the land into an orchard. In this case the land has always been used for an orchard. Therefore, if land could be held under the old Act for horticultural purposes, it certainly can be so held by virtue of section 19 of the present Act, for section 19 says "that every ryot who immediately before the commencement of this Act has by operation of any enactment a right of occupancy in any land shall when this Act comes into force have a right of occupancy in that land."

(1) 2 W. R., Act X, Rul. 40.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

In this case both the Courts have found that the plaintiffs have held this land for a period of about fifty years, and that they had acquired a right of occupancy in it before the Tenancy Act of 1869 was repealed by the present Act.

It is contended that there is no provision in the present Act by which a person who holds land for any purpose other than that of cultivation can acquire in it a right of occupancy, that the plaintiffs are not ryots as defined in the present Act, and that section 19, which saves a right of occupancy acquired by a ryot before the commencement of the present Act, has no application to the plaintiffs.

In the first place we should be disposed to hold, apart altogether from the provisions of section 19, that if a right of occupancy had been acquired under the old Tenancy Act, it is not forfeited by the repeal of that Act, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired. It is unnecessary to say more for the purpose of this appeal; but we should also be disposed to hold that there is nothing in the definition of a ryot in the present Act which would include a person who had taken land for horticultural purposes. The definition is not, as the word primarily would denote, an exhaustive definition; and there is nothing in the Act to indicate that it was the intention of the Legislature to exclude from its operation horticultural land to which the provisions of the repealed Act had uniformly been held to apply.

It is further contended that both the Courts below in holding that the plaintiffs' possession continued up to 1295 have omitted to find in what way they held possession. The plaintiffs' case is set out in paragraph 4 of the plaint, that they held possession through under-tenants; and we must take it that in holding that the plaintiffs' possession was established, the Lower Courts meant to find that it was established in the particular way set out by them.

The appeal is dismissed with costs.

Appeal dismissed.

C. S.

Before Mr. Justice Macpherson and Mr. Justice Gordon.

1893
June 20.

WATSON AND COMPANY (PLAINTIFFS) *v.* SREEKRISTO BHUMICK AND OTHERS (DEFENDANTS).*

Bengal Tenancy Act (VIII of 1885), *ss.* 53, 153—*Suit for arrears of rent—Dák cess when considered as rent—Appeal where subject-matter under value of Rs.* 100.

Where *dák* cess is claimed under the contract by which rent is payable, it must be regarded as rent, *i.e.*, as part of what is lawfully payable in money for use and occupation of the land held by the tenant; and where there is a dispute with regard to such *dák* cess, the amount of rent is in dispute, and an appeal lies though the amount in dispute is less than Rs. 100, and notwithstanding the provisions of section 153 of the Bengal Tenancy Act.

The established usage of the locality, and not the usage between the parties, is that contemplated by section 53 of the Bengal Tenancy Act.

Hira Lal Das v. *Mothura Mohun Roy* (1) followed.

THE plaintiffs, the proprietors of a twelve-annas share in mouzah Gofurabad, sued the defendants for arrears of rent payable in four instalments according to the provisions of section 53 of the Bengal Tenancy Act for the years 1296 and 1297 (1889 and 1890) and for cesses and *dák* cess. The *dák* cess was claimed under the contract by which the rent was payable. The defendants contended that they were not bound to pay the rent in four instalments, and called one witness, who proved that it was the custom (as between the landlord and tenant only) that the rent was payable annually. They also contended that they were not liable for the *dák* cess.

The Munsif found that the defendants had failed to establish any local custom as regards the annual payment of the rent, and that therefore, under section 53 of the Bengal Tenancy Act, the rent was payable in four equal instalments. He further found that the defendants were bound to pay the *dák* cess, and gave the plaintiff a decree with costs and interest at 6 per cent.

* Appeal from Appellate Decree No. 1382 of 1892, against the decree of A. G. Steinberg, Esq., Officiating District Judge of Rajshahye, dated the 5th of May 1892, modifying the decree of Babu Koylash Chunder Mozoomdar, Munsif of Natore, dated the 25th of November 1891.

(1) I. L. R., 15 Calc., 714.

On appeal the Judge reversed the Munsif's finding on all points and disallowed the interest awarded.

From this decision the plaintiffs appealed to the High Court.

Babu *Bhowany Churn Dutt* for the appellants.

Babu *Bykunto Nath Das* for the respondents.

The judgment of the Court (MACPHERSON and GORDON, JJ.) was as follows:—

A preliminary objection has been taken by the respondent that under section 153 of the Bengal Tenancy Act no appeal lies in this case. The suit is to recover from the defendant rent due to the plaintiff, including cesses and *dák* tax, and the amount claimed is less than a hundred rupees. The *dák* cess is claimed under the contract by which the rent is payable; it is claimed practically as part of the rent, and according to the definition of that word as contained in the Bengal Tenancy Act, we think it must be regarded as rent, that is to say, as a part of what is lawfully payable in money for use and occupation of the land held by the tenant. The occupation of the land was the consideration for the payment of the *dák* cess, and that being so, the amount of rent is in dispute, and this takes the case out of the provision of section 153, which in certain cases bars an appeal.

The appellant contends, *first*, that the Lower Appellate Court was wrong in reversing the decree of the First Court and holding that the defendant was not bound to pay the *dák* cess under the agreement; *secondly*, that it was wrong in reversing the decree of the First Court as to the instalments in which the rent was payable; and *thirdly*, that it was wrong in reversing the First Court's decree as to the interest payable.

As regards the first point, we think that the Lower Appellate Court was right, that there was no contract to pay the *dák* cess in particular, and that the mere fact that the defendant had for a considerable number of years been paying it would not render him liable to pay it for all time, if he was not legally bound to do so.

The decision of the Lower Appellate Court upon the other two points appears to us to be clearly wrong. The First Court held that in the absence of any agreement or established custom the

1893

WATSON v. SREEKRISTO BHUMICK.

rent must be paid in four instalments under the provisions of section 53 of the Bengal Tenancy Act. It appears that only one witness spoke to the periods at which the rent had been paid, and his statement was of a very ambiguous character. The Judge, however, held on the strength of it that the whole rent was payable at the *punya*, but he does not expressly find whether, being so payable, it was payable in advance or in arrear, and the decree does not throw any light on that question But, however that may be, we think the Judge was entirely wrong in holding that the established usage was proved by what that witness stated. In the case of *Hira Lal Das* v. *Mothura Mohun Roy* (1) it was held that the established usage referred to in section 53 was not the usage between the parties, but the established usage of the locality; and that is a point upon which the witness does not profess to speak. Under the circumstances, therefore, the Munsif was right in holding that in the absence of any proof of any agreement or established usage the rent was payable in four instalments in accordance with the provisions of section 53 of the Bengal Tenancy Act.

As regards also the question of interest the Judge has clearly made a mistake. The Munsif allowed interest from the date of the institution of the suit on the sum decreed as rent, and from the date of the decree on the total amount decreed. The Judge considers that when damages were awarded under section 68, it was not competent to the First Court to allow any further sum as interest after the date of suit. By the proviso to section 68 interest is not to be decreed where damages are awarded; but we think that the damages represent the sum which the plaintiff is allowed in lieu of interest up to the date of suit; and that the award does not interfere with the interest which under section 68 may be allowed subsequent to that date, certainly it would not prevent the Court from allowing interest from the date of decree.

The result is that the decree of the District Judge will be amended by adding to it interest on the sum decreed as rent at the rate of six per cent. per annum from the date of the institution of the suit up to the date of the decree, and interest on the total

(1) I. L. R., 16 Calc., 714.

amount decreed, at the same rate, from the date of the decree until payment, and by striking out therefrom the words

1893

WATSON v. SREEKRISTO BHUMICK.

"নিম্ন আদালতের মূদের আদেশ ও চারি কিস্তিতে খাজনা আদায় হইবার সিদ্ধান্ত রহিত হয়।"

We make no order as to costs.

Decree varied.

C. S.

PRIVY COUNCIL.

SULEMAN KADR (DEFENDANT) *v.* MEHDI BEGUM SURREYA BAHU (PLAINTIFF).

*P. C.**
1893
June 20.
July 8.

[Appeal and cross appeal from the Court of the Judicial Commissioner of Oudh.]

Mahomedan law—Dower—Law in Oudh—Discretionary power of the Courts over the amount of dower—The Oudh Laws Act (XVIII of 1876), s. 5.

In a suit by a wife for her dower the Appellate Court altered the amount decreed by the First Court, as a reasonable sum payable in lieu of an excessive one, which the husband had on the date of the marriage nominally entered in a *nikahnama* as the wife's dower. Both Courts acted under the Oudh Laws Act, XVIII of 1876, section 5. The Judicial Committee having examined the grounds on which each of the Courts had exercised its discretionary power, considered the reason given by the First Court to be sound and restored its decree.

APPEAL and cross appeal from a decree (11th June 1889) of the Judicial Commissioner, varying a decree (28th March 1888) of the District Judge of Lucknow.

This suit was brought by the plaintiff, now respondent and cross-appellant, against her husband who now appealed, for a decree for dower. The wife claimed ten lakhs of rupees, together with one year's arrears of an allowance of Rs. 150 monthly. She claimed also a decree entitling her to payment of the same amount monthly during her life. Both Courts concurred in reducing her claim for the ten lakhs to Rs. 25,000. But the Judicial Commissioner, besides decreeing to her that amount, decreed to be payable

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

monthly to her Rs. 150, which the District Judge had refused to decree. This difference in the exercise of powers under the Oudh Laws Act, 1876, section 5, by the Court of first instance and the Appellate Court, both, however, concurring as to the lump sum, gave rise to this appeal.

The parties were Shias, and were of the former royal family of Oudh. On the day of the marriage, 2nd August 1871, a *nikahnama* or marriage contract was executed, in which it was stated that the marriage had taken place in consideration of a dower of ten lakhs of rupees and Rs. 150 a month to be paid by the husband to the wife; the monthly sum being stated to be fixed for her daily expenses as part of the dower, and this payment was secured by a bond and mortgage. Until July 1886 the defendant continued to pay the Rs. 150 every month, and he also paid a further sum of Rs. 50 at the same time. Then both allowances were discontinued and the husband and wife separated. Nothing more was paid. The plaint, filed 2nd August 1887, stated the marriage and agreement, claiming payment of ten lakhs and a decree for future monthly payments of the allowance. The defendant's answer admitted the facts alleged. His defence as to the whole agreement for dower was that it was invalid for uncertainty, and that no amount exceeding Rs. 500 was recoverable: that the sum of ten lakhs had been entered in the agreement for mere ostentation and was not a substantial amount ever intended to be paid. A further defence was that according to the custom of the ex-king's family, dower could not be recovered during the life of the husband, and that the plaintiff having left him could not sue for it. He stated that his whole income was Rs. 2,933 by the month and that his personal estate was worth about Rs. 60,000.

Six issues were recorded which raised the questions whether the contract of dower was void for uncertainty; what was a reasonable dower with reference to the position of the parties; whether the payments of Rs. 150 and Rs. 50 were made under contract; and lastly, whether the plaintiff had forfeited her rights.

For the defence the evidence of witnesses was given who were *mujtahid* or persons learned in the law of the Shias. They

stated that according to that law a dower made up of a fixed sum and a monthly allowance to the wife was void for uncertainty, as the two together formed a single dower, and the part consisting of the allowance was uncertain as it could not be known how long the recipient would live. Extracts from legal works of authority to the same effect were placed on the record.

The District Judge in his judgment expressed the opinion that the dower was not invalid for ambiguity or uncertainty. As to the wife's refusal to live with her husband, the Judge considered that the law laid down in a former decision in Oudh, justified a wife in so doing until settlement of her claim for dower. As to the defendant's means and resources he accepted his evidence. He was of opinion that the sum stated to be the wife's dower at the marriage was "plainly fixed for show." He assigned to the plaintiff a lump sum of Rs. 25,000, in full discharge of all her claims for dower. He ordered money down as likely to prevent future trouble, giving no decree for future monthly payments.

The plaintiff appealed from this decree on the ground that the whole dower ought to have been awarded; that, if not, the sum of Rs. 25,000 was insufficient; and that the Judge ought to have allowed the arrears claimed and future monthly payments of Rs. 150.

The defendant filed objections to the decree, alleging that the Court ought to have found that the dower was invalid, and that by the Mahomedan law no more than 500 drachmas (about Rs. 105) was payable. He also objected to the finding of the Judge as to the effect of the plaintiff's refusal to live with her husband.

The Judicial Commissioner affirmed the decree of the District Judge, but varied it by awarding a future monthly payment of Rs. 150 from the date of the decree.

Mr. *J. D. Mayne*, for the appellant, after referring to the *nikah-nama* of the 3rd August 1871 as of questionable validity to determine the dower, contended that on the facts found, the sum awarded by the Judicial Commissioner was not proportionate to the means of the defendant, and was therefore excessive. The

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

award of the first Court was the more correct of the two. It was questionable whether the law of the dower contemplated, or was applicable to, a monthly allowance; but there were other reasons why the sum of Rs. 25,000, as to which the Courts below had concurred, should not have received the addition made by the Judicial Commissioner. For even if dower was not forfeited by the wife's withdrawal from her husband, the monthly allowance, being a personal gift for maintenance, must be regarded as no longer payable. He referred to the Oudh Laws Act, 1876, section 5, and to Baillie's Digest of Mahomedan Law, Part II, Imamia Law, Chapter V, and to part of the judgment in *Mulka Do Alam Nawab Tajdar Bahoo* v. *Jehan Kadr* (1).

Mr. *R. V. Doyne* and Mr. *A. J. S. Darwood*, for the respondent and cross-appellant, argued that the Judicial Commissioner was right in holding that there was no such ambiguity or uncertainty in the contract as to have invalidated it; and that he was right in adding the monthly allowance to the lump sum awarded by the First Court. The discretion vested in the Court by the Oudh Laws Act, 1876, section 5, applied to the monthly allowance as included in the contract of dower. The separation had no effect to deprive the wife of either her claim to the ready money, or to the allowance fixed in the *nikahnama*, the latter not being distinguishable from the former, but both constituting dower. For the respondent as a cross-appellant, it was insisted that both the monthly allowance and the Rs. 25,000 were insufficient, if due regard were paid, and effect given, to the wife's real requirements and the husband's position. His means were quite adequate to the wife's claim, and he should have been ordered to pay the sum which he had admitted to be customary in his family, *viz.*, two lakhs. The arrears also of the wife's allowance should have been added in the decree.

Mr. *J. D. Mayne* replied.

Afterwards, on the 8th July 1893, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiff in this suit is the wife of the defendant, and she sues to obtain the dower which on their marriage he contracted to pay. The defendant has in all the stages

(1) 10 Moo. I. A., 252.

of the litigation, until the argument at this Bar, contended on several grounds that he is not liable to pay any dower, but those defences have been overruled in the Courts below, and have rightly been abandoned on the argument of this appeal. There is now no question except as regards the amount to be paid by the husband to the wife.

The marriage took place on the 2nd August 1871. On the 3rd two deeds were executed by the defendant. One written in Persian, declares the contract completed. After a florid exordium, relating mainly to the excellence of the married state, it states that the defendant had, in consideration of a marriage settlement and dower of the sum of 10 lakhs of rupees and Rs. 150 *per mensem*, brought within the net of perpetual marriage the plaintiff, whose personal merits it extols in highly extravagant terms. The other deed, written in Urdu, is more business-like. It makes the same statement as to the amount of dower, and adds that the second item, *viz.*, the annuity, is for the lifetime of the wife, and for the purposes of her personal expenses. And the defendant then goes on to mortgage a bond for Rs. 8,500 and his own dwelling-house valued at Rs. 20,000 by way of security for the annuity.

The parties lived together till the year 1886, when the wife withdrew from her husband's society. Legally speaking, her withdrawal has no effect on her claim to dower. Practically it led to a discontinuance of her annuity and to the present suit, in which she asks for a performance of the contract, and for the arrears of her annuity.

It is so common a thing among Mahomedans in this part of the world to put into marriage contracts for dower sums far larger than the husband can pay, or than the wife expects to receive, that Courts of Justice are armed with large powers over that class of contract. By the Oudh Laws Act, 1876, it is enacted:—

"Where the amount of dower stipulated for in any contract of dower by a Mahomedan is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by decree in favour of the plaintiff, or by allowing it, by way of set-off lien or otherwise, to the defendant; but the amount of the dower to be allowed by the Court shall be

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

reasonable with reference to the means of the husband and the status of the wife."

In this case the lady is of high status, being, as her husband is, a member of the Royal family of Oudh. But with respect to the means of the husband, it was found by the District Judge that they consisted of property worth Rs. 60,000 which was his absolutely, and of an income of Rs. 2,940 *per mensem*, which was his for his life. It further appears that at the date of the marriage he had two married wives, and three temporarily married wives; and he must then have had some children, for in the year 1887 he had four sons, two daughters, and eight grandchildren.

There is some evidence of his having had other property at some time; but it is clear enough that a contract by a man situated as the defendant was, to pay a million of rupees down, besides an annuity of Rs. 1,800 a year for the life of his wife, is a mere piece of bravado, allowed or possibly required by custom, but never intended for actual fulfilment.

In the exercise of the discretion given him by law, and under the above-stated circumstances, the District Judge found that Rs. 25,000 was a reasonable sum to cover all demands by the wife. The plaintiff appealed from his decree, and the defendant lodged objections. Each party took the same grounds before the Judicial Commissioner as before the District Judge.

The Judicial Commissioner found no evidence to show that the means of the husband were any larger than the District Judge had concluded, and he refused to grant the plaintiff any larger sum in actual cash than Rs. 25,000. But he added, "I do not however perceive why the Lower Court has "not granted the appellant the continuance of the monthly "stipend of Rs. 150, which was expressly selected by the defend-"ant as the mode in which he will always pay part of the "plantiff's dower." And he decided that the monthly allowance of Rs. 150 ought, under all the circumstances of the case, to be also decreed to the plaintiff. From the decree so modified both parties have appealed to Her Majesty in Council.

Their Lordships feel much difficulty in interfering with the exercise of a discretionary jurisdiction such as this.

Nevertheless, when the first Appellate Court has overruled the discretion of the primary Judge, and has altered his decree, an ulterior Court not of appeal can hardly refuse to examine the grounds on which the alteration is made. Now, the Judicial Commissioner states that he could not perceive why the District Judge did not decree payment of the annuity. But the reason is to be found in the judgment of the District Judge, *viz.*, that to give a lump sum is likely to avoid future trouble. That is a reason which strikes their Lordships as having considerable weight. Moreover, it clearly shows that the District Judge was looking at the case as a whole, and was considering what payment it was reasonable to substitute for the entire contract which could not take effect. The Judicial Commissioner also holds in one part of his judgment that the annuity is an integral part of the dower; but when he comes to fix the reasonable amount, he separates the two items; he makes a distinction between that part of the dower which was payable at once because no time was fixed, and that which was payable by monthly instalments; and he thinks that the latter ought to be more specifically executed than the former. It appears to their Lordships that the District Judge took the course indicated by the Statute, in considering whether the dower as a whole was excessive in reference to the means of the husband, and in considering what as a whole was a reasonable amount to be substituted. They are not intimating any general opinion against the award of an annuity in preference to, or in addition to, a sum down. Each case must depend on its own circumstances. In this case, however, they do not find any expression of opinion on the part of the Judicial Commissioner, that, having regard to the defendant's means, the District Judge had awarded too little. He does not address himself in terms to that question, he only states that the defendant had selected an annuity as a mode of paying part of the dower, and that he could not perceive why the Court had not decreed it. Certainly the sum of Rs. 25,000 does not seem to be a small sum for a man to settle who has only Rs. 60,000 in absolute interest, and who had at the time of his marriage, and has now, many family obligations to answer out of his life income. But their Lordships are not in a good position for

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

forming any opinion of their own as to what is a reasonable amount. They prefer to maintain the decree of the District Judge because he seems to have addressed his mind most directly to that which the Oudh Act requires, and his reason seems to have been overlooked by the Judicial Commissioner.

The result is that they will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, to dismiss the plaintiff's appeal to the Judicial Commissioner with costs, and to restore the decree of the District Judge. The plaintiff must pay the costs of these appeals.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for the appellant and cross respondent: Messrs. *Young, Jackson,* and *Beard.*

Solicitors for the respondent and cross appellant: Messrs. *Walker* and *Row.*

C. B.

---

*P.C.** 1893. *June 27 and 28, and July 15.*

DAKHINA MOHAN ROY (PLAINTIFF) *v.* SARODA MOHAN ROY AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Voluntary payment—Money paid for benefit of another—Payment of revenue by the claimant of an estate while temporarily holding it under a decree in his favour, afterwards reversed—Liability of owner for money so paid for his benefit.

Where a claimant having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses (in default of which payment the estate would have been sold), although the decree may have been reversed afterwards, and he may have been deprived of possession, he nevertheless is entitled to be repaid the amount by his opponent, who benefits by it, provided that he has not realized, or failed through any fault of his own to obtain, enough out of the rents and profits during his possession to cover this expenditure.

The plaintiff had paid revenue and cesses in such a case: *Held,* that on his accounting for mesne profits, and all that he had received, or might have received from the estate, he should recover from the defendants, in whose favour the decree was ultimately made, the difference between his, the plaintiff's, payments and receipts.

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

APPEAL, by special leave, from a decree (9th February 1891) of the High Court, reversing a decree (16th September 1889) of the Subordinate Judge of Rangpur.

This suit was brought by the appellant, the adopted son of Kali Mohan Roy who died in 1856, to recover from the defendants now respondents, Rs. 5,767 the amount of revenue and other public demands recoverable in like manner, paid by the plaintiff to prevent a sale by the Collector, in respect of an estate comprising four mehals in Rangpur, on different dates from September 1885 to September 1886, amounting with interest to Rs. 7,489. The plaintiff when he made this payment was in possession of one of the mehals under a decree of the High Court, dated 25th March 1882, afterwards reversed by order of Her Majesty in Council dated 9th April 1886. The question on this appeal was whether he was entitled to recover the above sum from the defendants, in whose favour the decree ultimately stood, or as the High Court had held, was not so entitled.

The facts, which were not in dispute, were these :—

Kali Mohan Roy had two brothers, Tarini Mohan and Hari Mohan, who before February 1836 were originally in joint and undivided possession with him of the four mehals, of which one bore the *tauzi* number 146. In 1836 a private partition between the brothers took place, and they took among themselves separate possession of equal portions consisting of villages belonging to all the four mehals, on which the total Government revenue amounted to Rs. 31,155, which the brothers agreed to pay in equal third parts. But there was no collectorate partition of the land or the revenue assessed upon it, either under Regulation IX of 1811 or any other revenue law relating to partition, so that the entirety of each mehal remained liable for the revenue upon each. On the deaths of Kali Mohan and Tarini Mohan, their respective sons had their names entered as proprietors of the shares of their fathers. The present question relates to half the share of Hari Mohan, who died in 1846 leaving two widows, to each of whom he gave power to adopt a son to him. Then the several adoptions of Saroda Mohan, one of the present defendants, which took place in 1853, and of Durga Mohan, father of the other defendant Jotendra Mohan, which took place in 1856, became the subject of litigation from

1893

DAKHINA MOHAN ROY v. SARODA MOHAN ROY.

1873 till 1886: see *Jagadamba Chaodhrani* v. *Dakhina Mohan* (1). Decrees were made in the High Court on the 25th March 1882 in favour of Dakhina the present plaintiff, and in favour of Tara Mohan Roy, son of Tarini, each for a two annas eight pie share in the estate, which had been Hari Mohan's. But the defendants in those suits (who were also afterwards the present defendants, respondents) appealed to Her Majesty in Council. They did not, however, obtain an order from the High Court to stay proceedings in execution meanwhile; and Dakhina, as he was entitled to do, obtained an order under which he was put into possession of almost all of mehal No. 146, between the 30th July and the 16th August in 1885. In the end the High Court's decree of 25th March 1882 was reversed by an order in Council, dated 9th April 1886, and possession was restored to his opponents. The next step concerned Dakhina alone. In 1887, after the order in Council of April 1886 had been enforced, a suit for the mesne profits of mehal No. 146 was brought by Saroda Mohan against Dakhina. It was then found as a fact by the Courts that in consequence of difficulties placed in his way by his opponents, Dakhina had only received a sum of Rs. 403 from the tenants, and that when the costs of collection had been deducted the profits were only Rs. 363: and that during that time he had to pay on account of the Government revenue, kists or instalments due from September 1885 to September 1886, Rs. 4,821, and Rs. 946 for cesses and *dâk* tax.

The plaint (20th September 1888) set forth the above, and the defence was, in effect, that the defendants were only liable in respect of revenue paid for that portion of mehal No. 146, of which they had remained in possession; and that payments, over and above Rs. 136, which covered what was due in respect of what they had retained, had been made by the plaintiff for his own interests, and voluntarily, in respect of revenue-paying estate not then in the possession of the defendants.

Issues were fixed that met all these points.

The Subordinate Judge decreed in favour of the plaintiff. He considered that the payments made by him, in respect of mehal No. 146, were not voluntary, but a necessity under the revenue

(1) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

law to prevent sale for arrears, and that the payments were, in the end, for the benefit of the defendants, who, obtaining the estate, were bound to repay the sums, with interest from the dates of payment.

The judgment of the First Court was reversed by a Division Bench (TOTTENHAM and TREVELYAN, JJ.) of the High Court. The Judges were of opinion that the plaintiff, during his period of possession, was a wrong-doer, and was not entitled to charge the defendants with payments made in his own interest at the time. Their judgment, as to the claim of the appellant, was as follows:—

"The suit was brought to recover Government revenue, cesses, and *dâk* fund paid by the plaintiff when in possession of this property.

"The Subordinate Judge has given the plaintiff a decree for what he claims. The defendants admit that they are liable for a portion of this sum which was paid on account of lands of which they retained possession; but they dispute any liability as to the rest.

"We think it quite clear that the plaintiff is not entitled to recover any outgoings in respect of lands wrongfully taken possession of by him. For a portion of the time he had not even the excuse of having a decree in his favour. As far as the time which elapsed between the plaintiff's getting possession and the Privy Council decree, we think it must also be taken that he was a wrong-doer. A person who is in possession under a decree which is subsequently set aside, is liable for mesne profits and cannot be said to be in rightful possession, and therefore is in wrongful possession. A person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits. This proposition is clear from *Tiluck Chand* v. *Soudamini Dasi* (1) and the other cases cited to us. The judgment of the Subordinate Judge is, therefore, we think, wrong, and should be altered, except so far as the property which remained in the possession of the defendants is concerned. The decree will be for the sums admitted in the 4th paragraph of the written statement, *viz.*, Rs. 200, with a proportionate amount of road cess and *dâk* fund cess, also interest at 12 per cent. from date of payment to the date of decree of the Subordinate Judge (these amounts must be inserted in the decree), with interest on decree at 6 per cent. and proportionate costs. The defendants must also pay to the plaintiff proportionate costs of the suit and of this appeal in respect of the amount decreed. The plaintiff must pay to the defendants proportionate costs of suit and appeal in respect of amount disallowed."

(1) I. L. R., 4 Calc., 566.

1893

DAKHINA MOHAN ROY v. SARODA MOHAN ROY.

On this appeal

Mr. *R. V. Doyne*, for the appellant, argued that the judgment of the High Court was erroneous in holding that the possession of the plaintiff, which had been under the decree of the High Court of 25th March 1882, was wrongfully taken by him. He had remained in lawful possession until the decision of the High Court was reversed by the order of Her Majesty in Council of 9th April 1886. There could be no more lawful title while it lasted than the decree of the competent Court, the execution of which decree the defendants had not applied to have stayed. It was not disputed that the payment of revenue was necessary to preserve the estate from sale for default. The rights of the owners of the four mehals, antecedently to the litigation which ensued upon the adoptions, shows that revenue paid upon mehal No. 146 secured the shares of others; and though the payment by the plaintiff was made at the time in his own interests, it operated to save the estate for the defendants.

It had been shown that the plaintiff, while in possession, had been unable, in consequence of the defendants' opposition, to get in the rents due, with the exception of a small amount. He referred to *Tiluck Chand* v. *Soudamini Dasi* (1); *Gopal Chunder Chuckerbutty* v. *Oodoy Lall Dey* (2); *Binda Kuar* v. *Bhonda Das* (3); and the Indian Contract Act, IX of 1872, section 69.

Mr. *J. D. Mayne*, for the respondent, Saroda Mohan Roy, argued that it was not necessary, in order to support the judgment of the High Court in its result, to insist upon the wrongfulness of the plaintiff's possession. At the time when the payments were made the plaintiff believed himself to be making them on his own account. The revenue was a charge upon the mehal in the plaintiff's hands, and it was the estate that had to pay it. The plaintiff's ultimate disconnection with any title to the estate did not involve the consequence that his payments of revenue were anything different from discharges of obligations imposed upon the land, for which he in consequence of his temporary possession of it, was liable at the time. He was bound so to hold

(1) I. L. R., 4 Calc., 566. (2) 10 W. R., 115.
(3) I. L. R., 7 All., 660.

the estate that, if he should not ultimately succeed in the litigation as to the adoptions, he would be in a position to restore it. The claim of the plaintiff could not rest upon any implied contract. He referred to the cases above cited.

Mr. *R. V. Doyne* was not called on to reply.

Afterwards, on the 15th July 1893, their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The question in this case is a very short one, and it is purely a question of law.

In March 1882 the appellant obtained a decree from the High Court establishing his title as against the respondents to a revenue-paying estate. In 1885 the appellant obtained possession of the estate in execution of the decree.

The decree of the High Court was reversed by the judgment of the Privy Council in April 1886, and in the latter part of the same year the respondents were replaced in possession of the estate in dispute.

In the interval, while the appellant was in possession, the respondents actively interfered with the tenants upon the estate, and in consequence of their obstruction the appellant received only a trifling sum on account of rents and profits. During the same period the appellant was called upon to pay, and did in fact pay, large sums for Government revenue and other charges assessed upon the estate, and recoverable in the same manner as Government revenue.

The Subordinate Judge held that, as the estate was preserved for the benefit of the respondents by the payments which the appellant had made, he was entitled to recover from the respondents the difference between the amount so paid and the net amount of the rents and profits which he actually received, and for which alone, owing to the conduct of the respondents, he was held accountable. That decision was reversed on appeal. The learned Judges of the High Court held that the appellant, though in possession under the decree of the Court, was in "wrongful possession," and they laid it down as a proposition of law of universal application that "a person who is in wrongful possession is not entitled to recover sums paid on account of

1893

DAKHINA MOHAN ROY v. SARODA MOHAN ROY.

outgoings, although he may be able to use them for the purpose of reducing the mesne profits."

Even if the rule stated by the learned Judges admitted of no exception—a proposition which it would be difficult to maintain, having regard to the recent case of *The Peruvian Guano Company* v. *Dreyfus Brothers* (1) in the House of Lords—it seems to be a somewhat strong thing to hold that the appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the highest Court in India. Not only was he in rightful possession and acting in good faith, but the respondents were acting wrongfully in trying to deprive him of the fruits of his decree otherwise than by due process of law.

The Government revenue represents that portion of the produce of the land which from time immemorial has been considered in eastern countries to belong as of right to the sovereign power in the State. In India payment in kind has long since been commuted for a money payment, which in some cases is fixed permanently, and in others is liable to revision by periodical settlements. Sometimes the Government revenue is spoken of as a quit-rent, sometimes as a land tax. But however it may be described, and however it may have been assessed, it is the first and paramount charge upon the land, and if default is made in payment, the estate is sold in a summary way. The Government gives a clear title to the purchaser, and the land is lost for ever to the defaulting proprietor.

Now, it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. Of course he is bound to account for mesne profits, for all rents and profits which he has received, or which without wilful default he might have received. But if owing to circumstances beyond his control, and still more if in consequence of some wrongful conduct on the part of his

(1) L. R., App Cas. 1892, 166.

opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity, and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts. The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognizes an equity to repayment in the case of a person who not being proprietor pays the Government revenue in good faith to protect a claim which afterwards turns out to be unfounded.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed and the decree of the High Court reversed and the decree of the Subordinate Judge restored. The respondents will pay the costs of the appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent, Saroda Mohan Roy: Messrs. *Barrow & Rogers.*

C. B.

GHASITI (UNDER GUARDIANSHIP) AND ANOTHER (DEFENDANTS) *v.* UMRAO JAN AND ANOTHER (PLAINTIFFS).

GHASITI (UNDER GUARDIANSHIP) AND ANOTHER (DEFENDANTS) *v.* JAGGU AND ANOTHER (PLAINTIFFS).

*P.C.**
1893
June 27,
July 22.

[On appeal from the Chief Court of the Punjab.]

Mahomedan Law—Custom—Succession to property among Kanchans—Practices not recognizable by law as customs—Immoral customs.

Among Mahomedan Kanchans, practices relating to their holding and inheritance of property, having an immoral tendency, were not recognizable as customs, or enforceable as law. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law.

Where property left by a female Kanchani, deceased, was claimed by her legitimate kindred, it was *held* that an "adoption," so called, in conformity with those practices, had not operated to separate her from the family in which she was born, The mode in which her property had been acquired

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

1893

GHASITI v. NANHU JAN.

was not the subject of the present question, which was only concerned with the right of personal succession to it; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance.

APPEALS from two decrees (27th June 1888) of the Chief Court, the first affirming a decree (15th May 1885), and the other reversing a decree of the same date, of the District Judge of Delhi.

These were two suits for possession of fractional shares of property valued at Rs. 20,000, left by Bando Jan, a resident of Delhi, one of the people called Kanchans who died on the 22nd August 1879. One of the suits was brought by two of her surviving sisters, and the second by her two brothers, of legitimate birth. In the suit which the sisters instituted in 1882 the two brothers joined at first; but the latter afterwards obtaining leave to sue, abandoned it; and commenced the other suit in July 1884. Nanhu Jan, one of the sisters of the deceased, who had obtained possession of her property, was a defendant in both suits, and Ghasiti also was a co-defendant, the latter being alleged to have been adopted by the late Bando Jan, who herself was said to have been adopted by Dildara, deceased, also of the Kanchan class, and a dancing girl of Delhi, whose property had come to Bando Jan.

The difference between the claim of the males and that of the females was that the former claimed under the Mahomedan law, while the latter claimed according to an alleged custom of the Kanchans. The relationship of the parties appears in their Lordships' judgment, where all the facts are stated.

Another sister named Banno Jan, who had sued for her share in 1880, had obtained a decree for it. The objection was taken below that the withdrawal of the brothers from the suit of 1882, having been made without the consent of the sisters, their co-plaintiffs in that suit, a second suit by them could not be allowed consistently with the last clause in section 373, Civil Procedure Code. The male plaintiffs claimed each one-fourth, and the females each one-sixth of the estate, and as to the claim of the latter, in the event of no valid custom being established, the rule of Mahomedan law would become applicable in virtue of section 5, clause 2, of the Punjab Laws' Act (IV of 1872).

The defence in both suits was that neither the brothers nor the sisters were heirs of Bando Jan, for the reason that she had been "adopted" by Dildara, years before her death, and had thus been transferred into another family. It was also alleged for the defence that brothers, by the rules of the Kanchan people, could not inherit where there were sisters; and, again, it was contended that if the plaintiffs could have been considered heirs, they would have been excluded by Ghasiti, who had been "adopted" by Bando Jan. Lastly, even failing the adoption, Ghasiti claimed under a will alleged to have been executed by Bando Jan. That Bando Jan was taken as a daughter to Dildara in her lifetime, and had received her estate in her death, was not disputed in the case.

The District Judge was of opinion that the alleged customary rule of succession among the Kanchans was bad (sections 5 and 6 of Act IV of 1872), and he held that treating the property as Bando Jan's, the Court must go to the Mahomedan law to find her heirs. These were her two brothers and her four sisters. Each of the sisters was entitled to one-eighth, and each of the brothers to one-fourth by that law. But the suit of the brothers was dismissed by the District Judge on the ground that it had been barred by their withdrawal from the first suit, in which they were plaintiffs with their sisters, without the consent of the latter to their change of claim.

Three appeals were filed in the Chief Court from this decision. In one appeal the male plaintiffs contended that the District Judge had erred in holding their suit barred; in another, the defendants appealed from the decree obtained by the sisters; in a third, Amir Jan, one of the latter, cross-appealed, claiming one-sixth instead of one-eighth.

These appeals were disposed of in a single judgment by the Chief Court which upheld the judgment of the District Judge in the suit brought by the female plaintiffs, dismissing Amir Jan's cross-appeal. But the Chief Court allowed the appeal of the brothers, as there was no real reason why they should not have had the decree to which the District Judge would have held them entitled, had they not separated their suit from that of their sisters. Accordingly, they received one-fourth each. Thus the

1893

GHASITI v. UMRAO JAN.

Chief Court disallowed the defences based on the alleged custom of the Kanchans, on the alleged adoptions, and on the alleged will.

Nanhu Jan and Ghasiti joined in appeals from the decrees in both suits.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for the appellants, argued that the correct decision would have been that the plaintiffs had not proved their title to the property which the sisters and the brothers respectively claimed, and claimed on different, if not contradictory, grounds. There had been an assumption that the Mahomedan law was applicable; and whether it could or could not be maintained that valid customs had been proved, the evidence showed that the parties to these suits had abjured that law if they had ever been bound by it. The giving double shares to the male plaintiffs was only to be supported on the theory that the Mahomedan law was applicable. The order of the District Judge, allowing withdrawal from the sisters' suit by the brothers without the consent of the former previously obtained, and the subsequent increase of the shares claimed by the latter, was irregular and hardly authorized by the section 373, Civil Procedure Code. In the course of the argument *Mathura Naikin* v. *Esu Naikin* (1) was referred to.

The respondents did not appear in either appeal.

Afterwards, on the 22nd July, their Lordships' judgment was delivered by

LORD HOBHOUSE:—These suits relate to the inheritance of a woman named Bando Jan who died in August 1879, leaving a substantial property. Her father Ali Bakhsh and his children professed the Mahomedan religion. She had no issue and she survived her parents. Her heirs according to Mahomedan law were her two brothers, Jaggu and Sannu, who are respondents in the second appeal, and her four sisters, Amir Jan (now represented by Umrao Jan) and Ilahi Jan, who are respondents in the first appeal, Nanhu Jan who is one of the appellants in both appeals, and Banno Jan; and as between them the inheritance would be divided into eight shares, each brother taking two shares and each sister one.

(1) I. L. R., 4 Bom., 515.

Banno brought a suit and obtained a decree in February 1880 for a one-eighth share; and she is no party to the present litigation.

In the year 1882 the two brothers Jaggu and Sannu, the two sisters Amir and Ilahi, and a woman called Imaman, sued the remaining sister Nanhu who had got into possession of the property. They alleged that, Banno being satisfied, the remaining property was divisible into six shares, of which Nanhu was entitled to one, and each of the five plaintiffs to one. They made out their claim as follows. All the parties to the dispute belong to the people (in the translated plaint it is called the tribe) of Kanchans. In that tribe the business of brothel-keeping and prostitution is carried on by families or communities who are recruited by adoption. Bando left her own family to be adopted by one Dildara, who was the head of another establishment of the same kind. She succeeded to Dildara's property; and as Dildara was dead, and her brothel had ceased to have any members except Bando herself, on Bando's death her estate was distributable according to the custom of the Kanchans, which, it was alleged, would carry it to the family heirs of Bando, and to Imaman, the sister of Dildara, in equal shares. It is obvious that such a claim is full of difficulty and apparent inconsistencies in itself, but it was made.

After a while the brothers reconsidered their position. They determined to assert a claim under the common law of Mahomedans, by which they would take larger shares than under the custom of Kanchans. Thus their interests became adverse to those of their sisters, and they could no longer be co-plaintiffs. They procured orders under which they were made defendants instead of plaintiffs. And they instituted a suit of their own, to enforce their claim against their three sisters. This is the second suit in which an appeal is brought. These matters of procedure have no importance except for the reason that the institution of the brothers' suit is objected to as irregular. The Chief Court have held it to be regular, and their Lordships have declined to hear the appeal on this point argued. The decree complained of can be made as properly in the suit where the brothers are defendants as in that where they are plaintiffs, and the objection is based on a technicality without any practical bearing.

1893

GHASITI v. UMRAO JAN.

The substantial defences of Nanhu were, first, that Ghasiti was the adopted daughter and also the legatee of Bando; and secondly, that as Bando had been adopted by Dildara, no right of inheritance could devolve on the plaintiffs either by Mahomedan law or by custom. The allegations respecting Ghasiti were negatived by both Courts; so that the only questions which remained for them were whether the plaintiffs could claim any inheritance, and if so, in what shares. Imaman was discharged from the suit, and died before the hearing. The contest, therefore, was between the two sisters claiming customary shares, the two brothers claiming shares by common law, and the third sister contending that none of her father's family had any claim at all.

It is quite clear that there was no adoption under any general Indian law. Adoption is not known to the general law of Mahomedans, and adoption of girls is not known to the general law of Hindus. If there was adoption, it could only have been under some local, tribal, or family custom, which must be proved by those who allege it. Accordingly, a great deal of evidence was given to prove the customs of the Kanchans. The two Courts are in accord as to the result, a portion of which their Lordships will now re-state.

It appears that each family or community live a cœnobitical, quasi-corporate, life in what the learned Judges call the family brothels. All the members, including males, are entitled to food and raiment from the business, the males living a life of idleness at the expense of the females. There is no such thing as separate or individual succession upon death. All the members succeed jointly. No division or partition is allowed, for that would break up the establishments, and the witnesses say that the lamp should be kept burning in the house. A member of a family brothel who leaves it does so with only her clothes on her back and nothing more. The body is recruited by adoption. A girl is brought in as the adopted daughter of a female member of the institution, and the girl thus adopted is regarded as having ceased to belong to her own family.

That Bando was adopted by Dildara according to the custom, there seems to be no doubt, if indeed there was any dispute. Whether she thereby acquired a right of inheritance according to the custom is a question which does not arise in this suit. She

joined Dildara's establishment, and on Dildara's death became its head, took the property there, and increased it by her own earnings. But the suit relates entirely to the succession from Bando; it raises no question as to the succession from Dildara to Bando, nor has anybody made any claim adverse to Bando in respect of property belonging to Dildara, or in respect of any property possessed by Bando at her death. The question is how that property is to devolve, and how Bando got it is immaterial.

The two plaintiff sisters contend that Bando held the property as head of the brothel into which she had been adopted. By what process they claim that it passed to them and the other plaintiffs is, as above intimated, not easy to understand. The defendant sister is more logical. Agreeing that Bando was adopted by Dildara, she says that the adoption severed Bando completely from her own natural family. That certainly is the effect of adoption by Hindu law, and the evidence shows that it is the same according to Kanchan custom. A distinct issue on the point was settled and decided by the first Court.

On this issue the District Judge found as follows:—"Upon the custom as above stated no question can arise as to Bando Jan having ceased to be a member of her natural family by being adopted by Dildara. The adoption (if proved) really was for the purpose of succession to Dildara's family brothel, and in this way Bando Jan ceased to be a member of the brothel of her natural family, and ceased to have any claim therein." But he stated his view of the law to be that all these rules and customs of the Kanchans aim at the continuance of prostitution as a family business, that they have a distinctly immoral tendency, and should not be enforced in Courts of Justice. He therefore held that the whole transaction was null and void, that there was no severance of Bando from her family, and that her property must be distributed according to Mahomedan law.

The Chief Court expressly abstain from pronouncing any opinion on the question whether the adoption of a girl by a prostitute at the head of a brothel gives that girl any legal rights in the property of the institution. They sum up the case thus:—"As to the custom of inheritance, there is none applicable. It is clear that Bando Jan left the family brothel of Ali Bakhsh, and no question arises as to succession to Bando Jan as a member of that institution.

1893

GHASITI v. UMRAO JAN.

She was the last survivor of the brothel of which she became a member under Dildara, and no question arises of succession to her as a member of that brothel."

Their Lordships are disposed to think that is a sound conclusion; and if so, it would suffice to settle the controversy between the plaintiff sisters and their brothers. But it does not cover the whole ground. If the custom is valid, what answer is there to the defendant sister's contention that Bando's natural family could not inherit from her after her adoption by Dildara?

Their Lordships have no hesitation in affirming the law as laid down by the District Judge. In the case of Hindus there are stronger grounds for maintaining that practices of prostitution are related to worship in the temples, and meet with countenance from the law. But even in the case of Hindus great difficulties have been felt by Courts of Justice in admitting the validity of transactions intended for the furtherance of prostitution. See the case of *Mathura Naikin* v. *Esu Naikin* (1) and the authorities there referred to. And as regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws.

Mr. Baillie's valuable Digest of Mahomedan Law opens thus:—"The intercourse of a man with a woman who is neither his wife nor his slave is unlawful, and prohibited absolutely, When there is neither the reality nor the semblance of either of these relations between the parties, their intercourse is termed *zina*, and subjects them both to *hudd*, or a specific punishment for violating the laws of Almighty God." The statement is quite justified by the authority of the Hedaya, Book VII., caps. 1, 2, and 3, according to which the practice of *zina* is held up to reprobation, and is punishable in ways which would now be considered as savage and cruel. Indeed the most venerable of all authorities, the Koran itself, though not going so much into detail as the Hedaya, forbids harlotry under severe penalties, see caps. 4 and 24 of Sale's Translation. It seems to their Lordships impossible to say that such customs as are proved in this case to exist among the Kanchans are not contrary to the policy of the great religious community to which the Courts have found that all the parties belong.

(1) I. L. R., 4 Bom., 545.

A minor point in the case relates to certain moveable property which appears to have been stolen after the commencement of litigation by Banno. The Courts below have concurred in thinking that Nanhu had the property in her possession, and therefore is responsible for the loss, and their Lordships consider that it would not be proper to disturb concurrent decisions on such a point. The result is that both appeals should be dismissed, and their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants; Messrs. *T. L. Wilson & Co.*

MAHOMED RIASAT ALI (DEFENDANT) *v.* HASIN BANU (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*P.C.**
1893
June 28 *and July* 22.

Mahomedan law—Succession of a Mahomedan widow by local custom to a life-interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate—Civil Procedure Code (Act XIV of 1882,) *s.* 43—*Limitation Act (XV of* 1877), *schedule II, articles* 49, 120, 123.

A decree in a suit brought by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower, gave no occasion for the application of section 43 of the Civil Procedure Code, having been made upon a cause of action distinct from that on which the present suit was founded. *Raja of Pittapur* v. *Venkata Mahipati Surya* (1) referred to, and followed.

Article 120, schedule II, Limitation Act, XV of 1877, was held applicable to this suit, which was not a suit for a distributive share of property within the meaning of article 123 of the same; and was not a suit for specific moveables wrongly taken within the meaning of article 49, nor was any other article of schedule II applicable.

APPEAL from a decree (26th March 1889) of the Judicial Commissioner, affirming, with a variation, a decree (27th February 1887) of the District Judge of Lucknow.

* *Present :*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

(1) I. L. R., 8 Mad., 520; L. R., 12 I. A., 119.

1893

MAHOMED RIASAT ALI v. HASIN BANU.

The suit out of which this appeal arose, was brought on the 1st September 1884 by Mussamat Hasin Banu, widow of Mosheraf Ali, a Mahomedan, who died in Lucknow on the 28th November 1880. The object of the suit was to obtain a declaration of the widow's proprietary right in the property left by her deceased husband, which she alleged to have been taken by his only brother the defendant, on the above date, and to obtain an order for the possession of it. The property consisted of a half share in the zamindari village of Saleh Nagar in the Lucknow district, fractional shares in other villages, interests in groves, gardens, and houses at Amethi and Lucknow, mortgage interest, and debts due to the deceased, cash, and personal effects: the whole valued at Rs. 35,788. This included a claim for mesne profits of half Saleh Nagar.

The plaint, amended on the 24th September 1884, alleged that Mosheraf Ali was a Sunni, and claimed "that the plaintiff according to the custom and the entries made in the settlement *wajib-ul-arz*, is entitled to the succession, and to inherit the entire property left by her deceased husband, and to hold proprietary possession thereof." The plaint added:—"The plaintiff according to Mahomedan law also is entitled to inherit one-fourth of the property of her husband." The settlement *wajib-ul-arz* was that of village Saleh Nagar: the material part of it is set forth in their Lordships' judgment where the facts appear. The defendant by his written statement claimed the whole of Saleh Nagar in virtue of a *sanad* from the Government, dated 30th October 1867. Neither he nor Mosheraf Ali were named therein, but the two brothers had signed the *khewat* of settlement, dated 22nd April 1868, which declared them to be the proprietors of the village. As to the other shares in villages, and portions of landed property claimed by the widow, the defendant asserted that some were purchased out of the income of the village Saleh Nagar, and were therefore his; that others were joint ancestral property to which by local custom the widow had no claim, except for maintenance, and that the mortgages represented his own advances, though taken in Mosheraf Ali's name. As to the moveable property, the defence was that the suit was barred by limitation. As to the entire claim, it was defended on the ground that it was barred by section 43 of the Civil Procedure

Code, inasmuch as it should have been included in a suit for the widow's dower brought by her against the same defendant, and decreed in 1881.

The District Judge settled issues raising questions as to the ownership of village Saleh Nagar, and as to the rights of the widow as heir, and (17th March 1885) recorded his judgment that the village Saleh Nagar was held jointly by the two brothers as admitted in the *khewat* signed by them; that by local custom as evidenced by the *wajib-ul-arz*, and the statements of the witnesses, a widow succeeded to the whole of her husband's proprietary estate in a zamindari village. He found that there was no evidence of usage excluding her from inheritance to other property. Afterwards (19th November 1885) a District Judge who succeeded him in office conducted the trial. The new District Judge recorded five additional issues, two of which raised the legal defences of limitation and previous decision, set up by the written statement, while others were for ascertaining the amount of property left by Mosheraf Ali, and the mesne profits since his death. He held (29th January 1886) that the whole claim was barred by section 43, Civil Procedure Code, because, when bringing her suit in 1881, the plaintiff had two grounds of title, *viz.*, dower on which she sued, and heirship on which she did not sue, but might have sued. But she was bound, in his opinion, to put forward both at the same time. As regards the moveable property, he held that the suit was barred as coming within article 49 of schedule II of Act XV of 1877, and not article 123, the period being three years from the death of the husband. The result was that he dismissed the suit. The plaintiff appealed to the Judicial Commissioner, the defendant filing objections to the decision of the first Judge. The judgment of the 29th January 1886 was reversed, and the suit was remanded for a decision upon the issues of fact as to the property left by the deceased. The widow then called witnesses to show that the lands which stood in Mosheraf Ali's name were really his, and the defendant attempted to show that they were held in trust for him, Riasat Ali.

The District Judge finally found as regards the lands that the alleged trust was not proved, and that Mosheraf Ali was the owner of the different properties which stood in his name. He also found

1893

MAHOMED RIASAT ALI v. HASIN BANU.

that the moveables and cash left in the house of the deceased belonged to him and not to the defendant. He assessed the mesne profits at Rs. 3,750. The defendant appealed from both the judgments of the 17th March 1886 and the 28th February 1887. The plaintiff filed objections in which she claimed more than had been awarded to her by the last decree.

The Judicial Commissioner refused to allow the point to be raised before him for the first time, that the widow was a Shia, and as such could not inherit the estate. He then affirmed the judgment of the District Judge of the 17th March 1886 as to the interest of Mosheraf Ali in Saleh Nagar, and as to the widow's right to succeed to that interest. He modified the decree by declaring that she only took a life-estate. He then dealt with the judgment on remand in which he agreed, being of opinion that there was no evidence on which he could rely to show that Mosheraf Ali was a mere manager for his brother. He also considered that there was no ground for holding that the claim for mesne profits was barred by limitation.

On this appeal

Mr. *R. V. Doyne*, for the appellant, argued that irrespectively of the question whether the suit was barred by limitation as regarded the claim for cash and moveables, the properties other than Saleh Nagar acquired in the name of Mosheraf Ali alone, should not have been held to belong to him, by reason only of their standing in his name. The Courts below had erred in holding that as those properties were not proved to have been acquired out of the appellant's exclusive funds, they therefore belonged to Mosheraf Ali. As to the moveables and mortgage interests, the first Court had awarded them to the plaintiff, but should have at most awarded to her a life-interest in them. As to mesne profits, the respondent was entitled to recover only those which accrued in the period of three years. He referred to article 109 of schedule II of Act XV of 1877.

Mr. *J. D. Mayne*, for the respondent, argued that the suit had rightly been held not to be barred, either wholly or in part, by limitation. On all material questions of fact there were concurrent judgments which could not now be disputed. He admitted the

limitation of the claim for mesne profits to those accrued within three years.

Mr. *R. V. Doyne* was heard in reply.

Afterwards, on the 22nd July 1893, their Lordships' judgment was delivered by

SIR R. COUCH:—The plaintiff in the suit and present respondent is the widow of Mosheraf Ali, who died on the 24th November 1880, leaving, besides his widow, a brother, Riasat Ali, and two sisters. The amended plaint filed on the 24th September 1884, alleged that the plaintiff, according to the custom and entries made in the settlement *wajib-ul-arz*, was entitled to succession and to inherit the entire property left by her deceased husband, and alternatively that according to Mahomedan law she was entitled to inherit one-fourth of his property. It then alleged that on the 28th November 1880 the defendant, Riasat Ali, took possession of the entire property left by Mosheraf Ali, and prayed for a declaration of the right of inheritance and for possession of the immoveable property with mesne profits, or any other relief which the Court might deem proper to grant.

On the 27th October 1884 the plaintiff filed a list of the property claimed, both immoveable and moveable. The *wajib-ul-arz* referred to in the plaint was of a village, in form of a joint zamindari tenure, of which Mosheraf Ali had a half share. It contains in paragraph 4, relating to right of transfer and inheritance, the following statement: "A daughter, or her issue, does not get any share. If the deceased co-sharer have no male issue, but a female issue only, then indeed in that case the female issue can get a share. If all the wives be childless, they shall for their lifetime remain in possession of the deceased's inheritance in equal shares, with proprietary power." The allegation that the plaintiff was entitled to inherit the entire property left by her deceased husband was denied by the defendant's written statement.

The plaintiff had, on the 7th May 1881, brought a suit against the defendant, in which she claimed Rs. 30,000 for dower. On the 1st August 1882, a decree for Rs. 166 was made in that suit by the Judicial Commissioner in an appeal by the plaintiff from the order of the District Judge, who had dismissed the suit. The

1893

MAHOMED RIASAT ALI v. HASIN BANU.

defendant in his written statement alleged that the plaintiff had in that suit relinquished the claim for inheritance, and that the present suit was barred by section 43, Act XIV of 1882.

The proceedings of the District Judges before whom the case came may be briefly noticed. The first, Mr. Blennerhassett, made an order which was cancelled by his successor, Colonel Newbery, who framed additional issues and then dismissed the suit on the ground that it was barred by section 43 of Act XIV of 1882, and also as to the moveable property that it was barred by the law of limitation, applying to it art. 49 in the schedule to Act XV of 1877.

The Judicial Commissioner on appeal reversed this dismissal and remanded the case for trial on other issues which had not been decided. He held that the suit was not barred by section 43, and that art. 123, and not art. 49, applied. Thereupon Colonel Newbery made a decree that the defendant should deliver to the plaintiff possession of the immoveable property, specifying it, and should pay to the plaintiff Rs. 14,725-8-9 as detailed, that is—"Moveables to value of Rs. 764-12—Cash Rs. 8,910-3-3—Deposit money Rs. 1,300—Mesne profits Rs. 3,750-9-6."

The defendant appealed from this decree to the Judicial Commissioner, and the plaintiff filed objections to it. On this appeal the Judicial Commissioner made a decree, declaring the plaintiff to possess a life interest in the immoveable property of her late husband, *viz.*, in the half of Saleh Nagar and in the other immoveable property decreed to her by the District Judge, and ordering that possession should be given to her of the moveables to the value of Rs. 764-12 as decreed by the Lower Court, of the cash Rs. 8,910-3-3, and deposit money Rs. 1,300. Mesne profits were also allowed by the decree, amounting, after deductions on account of dower and funeral expenses, to Rs. 3,643-9-6.

The first objection taken in the present appeal is that the suit is wholly barred, under sections 42 and 43 of the Civil Procedure Code of 1882, by the decree in the dower suit. Section 42 is clearly not applicable. The suit for dower was properly framed. Section 43 says, "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause

of action . . . If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." The dower suit did include the whole of the claim in respect of the cause of action in the suit, *viz.*, the right to dower and the non-payment of it. No portion of that claim was either relinquished or omitted. It cannot be said that the claim of the plaintiff as heir of her husband to the whole of his property was a portion of her claim to dower. The causes of action in the dower suit and in the present suit are distinct, and it was pointed out by this Committee in the case of *Rajah of Pittapur* v. *Venkata Mahipati Surya* (1) that the corresponding section in Act VIII of 1859 does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought. The finding of the District Judge on this issue was rightly reversed by the Judicial Commissioner.

The next objection was that the claim to cash and moveables was rightly held by the first Court to be barred by limitation. Their Lordships do not agree with either the Judicial Commissioner or the District Judge as to the article in the schedule to the Limitation Act which is applicable. This is not a suit for a distributive share of property (art. 123), nor a suit for specific moveable property wrongfully taken (art. 49). This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Art. 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the schedule. Their Lordships think this article should be applied, unless it is clear that the suit is within some other article, which in their opinion it is not, and consequently the suit as regards the moveable property is not barred.

Another objection was that mesne profits are given for Saleh Nagar for four years, and art. 109 limits them to three years from when they are received. It was agreed that on this account Rs. 700 should be deducted from the balance of Rs. 3,643-9-6,

(1) I. L. R., 8 Mad., 520; L. R., 12 I. A., 119.

1893

MAHOMED RIASAT ALI v. HASIN BANU.

and the decree of the Judicial Commissioner should be amended by making that deduction. Lastly, it was objected that the decree of the Judicial Commissioner was erroneous in not including the moveable property in the declaration that the plaintiff had a life interest, as the custom stated in the *wajib-ul-arz* applied to moveable property as well as to immoveables. This is so, and the decree should be amended by making the declaration apply also to the moveables and the cash and deposit money. Their Lordships will humbly advise Her Majesty to order the decree of the Judicial Commissioner to be amended accordingly. The parties will bear their own costs of this appeal.

Decree varied.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Young, Jackson & Beard.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1893 *August* 11.

ANNOPURNA DASI (PETITIONER) *v.* KALLAYANI DASI (OPPOSITE PARTY).*

Letters of Administration—Probate and Administration Act (V of 1881), ss. 23, 41—Power of Court to associate another person with applicant in grant of letters of administration.

On an application for letters of administration to which the applicant is legally entitled under section 23 of the Probate and Administration Act, the Court has no power to order, under section 41 of the Act, that another person who has no present interest in the estate, should be associated with the applicant in the grant.

Section 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person.

THIS was an application by one Annopurna Dasi for letters of administration to the estate of her late husband Boroda Prosad

* Appeal from Original Decree No. 201 of 1892, against the decree of C. B. Garrett, Esq., District Judge of 24-Parganas, dated the 29th of June 1892.

Bysack, who died on 20th January 1881. The applicant had been managing the estate since his death. The material facts are stated in the judgment of the District Judge as follows:—

"It is admitted that letters of administration are sought because it is necessary to raise a sum of money, about Rs 25,000 or Rs. 26,000, to pay off certain debts for which the family estate is liable, and the widow conceives she will be in a better position to do this, if she obtains letters of administration. The application is opposed by the immediate reversioners' Kallyani Dasi, the daughter of the deceased, and her sons, on the ground that their grandmother has fallen under the influence of her brother Panchanan, and that they fear that if the letters of administration are granted to her, she will take advantage of the same and make over to her brother property which should come to the reversioners. They do not deny the necessity of raising a loan to the extent of Rs. 25,000, and they say that they are willing to join in any scheme for effecting this object on the best terms. On behalf of the applicant it is urged that she is entitled to the letters sought as of right, and that the Court has no authority to refuse them.

"The questions before me are: (1st) has the Court any discretion in granting letters of administration? (2nd) If it has such discretion, how should that discretion be exercised in this particular case? The objectors rely on section 85 of the Probate and Administration Act, but that section does not appear to me to be applicable to cases like the present. Section 85 appears to me to be applicable to cases in which the Court thinks no administration at all should be granted; but in the present case it cannot be said that no administration at all should be granted. It is admitted that the family is under a very urgent necessity of raising Rs. 25,000 and, inasmuch as one of the ultimate reversioners is a minor, it will not be easy to do this in a safe manner unless some one is vested with administration. The question is whether administration should be confined to the applicant alone. The section which appears to me to apply best to the circumstances of the present case is section 41, which gives the Court the power in its discretion to pass over the person entitled to administration, and impliedly, therefore, I take it, to grant him administration only upon terms. I think, therefore, that the Court is not bound absolutely to grant administration to the applicant. Then if I have a discretion, how ought it in this particular instance to be exercised? Some general charges in administration of the estate have been made against the applicant: none of them have been substantiated I think, however, that it cannot be said that the applicant's administration of the estate has been successful. She has enjoyed an ample income, and considerable loans have been repaid to the estate, yet the indebtedness has increased from Rs. 19,000 to Rs. 25,000. I do not think that the applicant has been shown to have misapplied any money, but

1893

ANNOPURNA DASI v. KALLAYANI DASI.

the fact is the reversioners and their father seem to have lived on the old lady; in fact, to have lived in a comfortable style in sloth and indolence, sponging on the applicant for all their maintenance. Panchanan also appears with several of his female relatives to have lived on his sister for about eight years. It is admitted that the applicant has now removed to her brother's house. It cannot be said that the brother is a person who has at all times acted disinterestedly; on the contrary, it is shown that he and his family have lived on his sister for six years. Under the circumstances I do not think that administration should be granted alone to the widow while she remains under his influence, it being admitted that administration is sought only for the purpose of raising money. It is said that she cannot raise money without a sanction from the Court under section 90; but such applications are usually dealt with on their own merits as disclosed in the application. It cannot be said that in each case the Court can undertake the responsibility of making an enquiry into all the circumstances of the family and ascertaining who and what relations the applicant has. I cannot say that I feel much respect for the reversioners; they appear to be persons who have never done anything useful and seek only to live in sloth and self-indulgence. Nevertheless, they are the persons to whom the property will ultimately belong, and they are interested in seeing that it is properly administered. Looking at all these circumstances, my order will be that administration will be granted to Annopurna Dasi only on the terms of her daughter Kallayani or her grandson Lal Behari Bysack being joined with her."

From this decision Annopurna Dasi appealed to the High Court, the only material ground being that the Judge ought to have granted administration to her absolutely, and not on terms of associating another person with her in the grant as he had done.

Sir *G. H. P. Evans*, Babu *Gonesh Chunder Chunder*, and Babu *Jadub Chunder Seal* for the appellant.

Mr. *Barrow* and Babu *Nilmadhub Bose* for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

This is an appeal against an order of the District Judge of 24-Parganas made on the application of Annopurna Dasi for letters of administration in respect of the estate left by one Boroda Prosad Bysack. This gentleman died some years ago, leaving the petitioner Annopurna Dasi, his widow, as his lawful heir. She has ever since the death of Boroda Prosad been in possession of the estate: she now applies for letters of administration.

The reason why letters of administration are now required is said to be this, that the estate is heavily involved, that is to say, there is a debt to the extent of Rs. 25,000, and this debt has to be discharged, and that it would be necessary to obtain the permission of the District Judge before any portion of the estate could be sold or mortgaged in order to raise money for the purpose in question.

This application was opposed by her daughter Kallayani Dasi and one of her grandsons, Lal Behari Bysack. They alleged, in the first instance, that no letters of administration were required; and secondly, that should the Court think it necessary to grant letters of administration, one or either of them might be associated with the lady in the administration.

Evidence was gone into in the Court below with a view to show how the estate had been managed since the death of Boroda Prosad; and an attempt was made on behalf of the opposite party to show that there had been a great deal of mismanagement or malversation by somebody or other. But the learned District Judge is of opinion that although the debt of Rs. 19,000 which was left by Boroda Prosad has now increased to Rs. 25,000, still it has not been shown that Annopurna has misapplied any money. The Judge is apparently of opinion, so far as we can gather from his judgment, that the main reason why the estate is involved is that the lady has had to support a large number of dependants, inclusive of the family of her daughter. It appears that her daughter, her daughter's husband, and her daughter's father-in-law, and a number of children born to her daughter, have been living with the lady, as well as her brother Panchanan Mallik. The lady has had to spend a great deal of money upon these individuals, and has had to give away in marriage several children born to her daughter, educate them, and incur various other expenses consequent upon their being with her. No doubt, as it seems to us, there has been some mismanagement of the estate, otherwise we cannot conceive how, with the income that the estate yields, which we understand to be about Rs. 900 a month, the debts went on increasing year after year, and no strenuous effort was made to diminish the liabilities.

But it appears that it was conceded before the learned District Judge by the opposite side, that there was a necessity to the extent

1893

ANNOPURNA DASI v. KALLAYANI DASI.

of Rs. 25,000, and that some steps should be taken in order to clear off the debts. That being so, we do not think that it is necessary for the purpose of the present proceeding to enquire any further into the reasons which led to the debts increasing year after year.

The District Judge is apparently of opinion, so far as we can gather from his judgment, that letters of administration should be granted to the petitioner; but he is at the same time of opinion that such letters of administration should be granted clogged with a condition, and that condition is that either her daughter or her grandson should be joined with her in the grant.

We do not think that this order is warranted by the Probate and Administration Act. Under section 23 of the Act, letters of administration should be granted to such person who, according to the rules for the distribution of the estate of an intestate, would be entitled to the whole or any part of the estate. So that the applicant Annopurna Dasi was entitled under that section to the letters of administration which she asked for. No doubt it was quite open to the Judge to refuse her application upon sufficient grounds; but that is not what he has done.

The Judge has proceeded upon section 41 of the Probate Act in directing that either Kallayani Dasi or Lal Behari Bysack should be associated with the applicant in the administration of the estate. We have carefully considered this section and other sections of the Act which bear upon this matter; and we do not think that the Judge has taken a right view. We think that section 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person. As we read the Act, there is no authority for saying that it is in the power of the District Judge, acting under section 41, to direct that somebody else, who has no present interest in the estate, should be associated with the person who under section 23 is legally entitled to letters of administration. That being so, we think that the learned District Judge has erred in holding that the grant of letters of administration to the applicant should be clogged with the condition mentioned.

We have had some hesitation in making up our mind as to whether, regard being had to the fact that there has been some

1893

ANNOPURNA DASI v. KALLAYANI DASI.

mismanagement, letters of administration should be granted to the applicant. But after full consideration, we do not think we should be justified in refusing her application. We have, however, considered how the action of the applicant in the management of the estate could be controlled. There are one or two sections of the Probate Act which bear upon this matter, and to which we would desire to call attention. One is section 78, under which it is incumbent upon the District Court to call upon the administrator to give security; and the other is section 98, under which an executor or administrator is to submit accounts from time to time; and it seems to us that if these two sections of the Act be kept in view, and if the applicant be called upon by the District Judge from time to time to submit proper accounts, much of the evils which are now complained of, and which we think do exist, would be avoided.

We accordingly direct that the order of the District Judge be set aside, and that letters of administration be granted to the applicant without any condition, but subject to this, that before letters of administration are granted to her, she should give sufficient security to the satisfaction of the District Judge, and that the District Judge should see that she does submit proper accounts from time to time in accordance with section 98. We make no order as to costs.

Appeal allowed.

J. V. W.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

FAEZ RAHAMAN AND OTHERS (DEFENDANTS) *v.* RAMSUKH BAJPAI AND ANOTHER (PLAINTIFFS).*

1893 *June* 29.

Sale for arrears of rent—Liability of auction-purchaser for arrears of rent prior to purchase—Bengal Tenancy Act (VIII of 1885), *ss.* 65 *and* 169, *cl. c.—Rent, suit for.*

The plaintiffs sued the first five defendants for arrears of rent due in respect of a certain tenure, and obtained a decree on the 16th of April 1888.

* Appeal from Appellate Decree No. 263 of 1892, against the decree of R. H. Anderson, Esq., Officiating District Judge of Chittagong, dated the 13th of November 1891, modifying the decree of Babu Shambhu Chunder Nag, Officiating Subordinate Judge of Chittagong, dated the 22nd of June 1891.

1893

FARZ RAHAMAN v. RAMSUKH BAJPAI.

In execution of that decree the tenure was sold on the 8th April 1891, the defendants 6, 7, and 8 being the auction-purchasers. On the 18th of April 1891 the plaintiffs sued all eight defendants for the arrears of rent which had become due between the 16th April 1888 and the 8th April 1891. *Held*, that the auction-purchasers (defendants 6, 7, and 8) were not liable, the arrears of rent sued for having become due prior to their purchase.

THE plaintiffs had brought a suit against the first five defendants for arrears of rent up to the year 1248 Maghi, and had obtained a decree, dated the 16th April 1888. In execution of that decree the tenure was sold, and was purchased by the 6th, 7th, and 8th defendants on the 8th April 1891. The first five defendants were in possession of the holding during the years 1249, 1250, 1251, and 1252, and failed to pay the rent. On the 18th of April 1891 the plaintiffs instituted a suit against the first five defendants for arrears of rent for those years, and the defendants Nos. 6, 7, and 8 (the auction-purchasers) were added as defendants. In the Subordinate Judge's Court, the 6th, 7th, and 8th defendants only appeared. The Subordinate Judge held that the claim for the year 1249 was barred by limitation, and that the defendants 6 to 8 were not liable for the rent prior to their purchase on the 8th of April 1891. On appeal, the Officiating Judge, relying on s. 65 of the Bengal Tenancy Act, held that the tenure was liable for the whole of the arrears, irrespective of the question whether it fell due before or after the purchase by the defendants 6, 7, and 8.

Against that decision the defendants 6, 7, 8, appealed to the High Court.

Babu *Golap Chunder Sarkar* for the appellants.

Babu *Akhli Chunder Sen* for the respondents.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

This appeal arises out of a suit brought by the plaintiffs-respondents to recover arrears of rent of a certain tenure for the years 1249 to 1252 Maghi, the plaint praying for a decree against defendants 1 to 5, the former holders of the tenure, and stating that as the tenure was liable for those arrears, defendants 6 to 8, who had purchased the tenure at a sale for its arrears of rent for 1248 and certain previous years, were also made parties.

Defendants 1 to 5 did not appear, but defendants 6 to 8 contested the suit on various grounds, of which it is now necessary to notice only one, namely, that the tenure was not liable for any arrears that accrued due before their purchase.

The first Court held that the claim for 1249 was barred by limitation, and the tenure was not liable for any arrears that fell due before the sale at which the defendants 6 to 8 purchased it.

On appeal by the plaintiffs, the Lower Appellate Court, relying chiefly on section 65 of the Bengal Tenancy Act, has made the tenure liable for the whole amount of arrears, irrespective of the question whether it fell due before or after the purchase by the defendants 6 to 8.

Against that decision the defendants 6 to 8 have preferred this second appeal, and it is contended on their behalf that the tenure was not liable for any arrears that fell due before their purchase.

We think this contention is sound. It is true that section 65 of the Bengal Tenancy Act makes arrears of rent due in respect of a tenure a first charge thereon; but that section, after enacting that a tenure-holder shall not be liable to ejectment for arrears of rent, declares that his tenure shall be liable to sale in execution of a decree for rent, and the rent shall be a first charge thereon. That, we think, goes to show that rent falling due during the time that a tenure belongs to any particular tenure-holder is a first charge on the tenure only so long as it is his and has not been sold for arrears of rent. And this, we think, is made clear beyond doubt by clause (*c*) of section 169, which enacts that if any surplus remains of the proceeds realized by the sale of a tenure in execution of a decree for arrears of rent, after satisfying that decree, any rent falling due between the date of the suit in which the decree was passed, and the date of sale, shall be paid therefrom to the decree-holder. This provision of the law evidently shows that the Legislature intended that the charge in respect of any rent falling due between the date of suit and the date of sale in satisfaction of the decree passed therein, shall be transferred from the tenure to its sale proceeds, and that the tenure shall pass to the purchaser at a sale for arrears of rent free of all

1893

FAEZ RAHAMAN v. RAMSUKH BAJPAI.

The learned vakil for the respondents contended that clause (*c*) of section 169 could not limit the charge created by section 65, and that the landlord might have a charge on the tenure as well as on the surplus sale proceeds. If that was the law, it might lead to greater injustice to the defaulter. For the tenure in the hands of the purchaser being liable for the rent falling due between the date of suit and date of sale, the purchaser will evidently bid for it so much less than its full value; while the surplus sale proceeds being also charged with such rent, the landlord may recover it from the surplus; and thus the defaulter may be made to pay the full rent and yet not get the full value of his tenure, while the auction-purchaser will get the tenure for less than its full value without having to pay any back rent. This we do not think the Legislature could ever have intended. If the value of the tenure is sufficient to pay off all the arrears due up to the date of sale, as the tenure would, upon the view we take of the law, fetch its full value, the landlord's demand would be paid in full. But if the value of the tenure be not sufficient to pay off all the arrears due upon it, then it must necessarily be an insufficient security for the arrear, and no view of the law can enable the landlord to realize his dues fully out of it. The opposite view of the law, if correct, would result in lowering the value of the tenure at any sale for arrears of rent, and what the landlord might get from the tenure by a second sale will be counterbalanced by the deficiency in price at the first.

The cases cited for the respondent—*Obhoy Chunder Bundopadhya* v. *Nilambur Mookerjee* (1) and *Khoda Bux* v. *Degumburee Dossee* (2)—are not in point. They relate to the liability of purchasers at ordinary sales in execution of decrees, and not to that of purchasers at sales in execution of decrees for arrears of rent.

For all these reasons we think the view taken by the first Court is correct, and the decree of the Lower Appellate Court must therefore be reversed, and that of the first Court restored, with costs in this Court and in the Court of appeal below.

Appeal allowed.

C. S.

(1) W. R., 1864, 73.
(2) W. R., 1864, 207.

SMALL CAUSE COURT REFERENCE.

Before Sir William Comer Petheram, Kt., Chief Justice, Mr. Justice Norris, and Mr. Justice O'Kinealy.

RAMDEO AND ANOTHER *v.* CASSIM MAMOOJEE.*

1893 *February* 10.

Contract—Delivery order for goods deliverable monthly—Sub-contract—Tender—Repudiation of contract.

The defendant entered into a contract with the Union Mills for the purchase of "90,000 gunny bags at Rs. 21-8 per 100 bags, delivery from October to March, each month 15,000 bags." Subsequently the defendant contracted to sell to the plaintiffs these 90,000 bags "at Rs. 24-2 per 100 bags, delivery from October to March, 15,000 each month, buyers to pay difference cash against delivery order on Mills." In August the defendant made out in the plaintiffs' favour a delivery order directing the mills to deliver 90,000 bags on receiving payment for the same at Rs. 21-8 per 100 bags, and on the same day sent to the plaintiffs a bill showing the amount of difference payable to him by them. The plaintiffs refused the delivery order on the ground that it had not been accepted by the mills; but on a subsequent tender of the order and bill, they offered, on the 5th September, to pay the amount of difference on receiving a delivery order accepted by the mills. The defendant treated the contract as at end and sold the bags in the market. In a suit for damages, *held*, that the defendant sold not only a delivery order, but the right to obtain from the mills 90,000 bags, deliverable in lots of 15,000 per month after payment of the difference; and impliedly undertook that the mills would accept the delivery order and deliver the goods in terms thereof when presented; that the plaintiffs were entitled to get the delivery order at any reasonable time before the first monthly instalment fell due; and further, that the defendant was not entitled to repudiate the contract after the plaintiffs' offer of the 5th September, and having done so was liable in damages.

REFERENCE to the High Court under section 69 of Act XV of 1882 and section 617 of Act XIV of 1882.

The suit was one for damages amounting to Rs. 1,181-4 by reason of the defendant having failed to deliver to the plaintiffs 15,000 A twill gunny bags in the month of January 1892, under a contract dated the 28th August 1891.

* Small Cause Court Reference, No. 4 of 1892, by G. C. Sconce, Esq., Chief Judge of the Calcutta Court of Small Causes.

1893

RAMDEO v. CASSIM MAMOOJEE.

On the 28th August 1891 the plaintiffs and defendant entered into a contract by bought and sold notes, by which the plaintiffs bought, and the defendant sold, 90,000 A twill gunny bags 44 × 26½, Union Mills make, at Rs. 24-2 per 100 bags—Terms, cash on delivery, which was to be given and taken from October 1891 to March 1892, each month 15,000 bags.

The defendant had previously, on the 19th June 1891, entered into a similar contract, through Messrs. Stavridi and Company, with the Union Mills, for the purchase from them of 90,000 A twills, at Rs. 21-8 per 100 bags, delivery 15,000 bags per month, from October 1891 to March 1892. The bought and sold notes between the plaintiffs and the defendant therefore contained a further clause, "buyers to pay difference cash against delivery order on the Mills."

On the 29th August 1891 the defendant made out a delivery order in favour of the plaintiffs, directing the Mills to deliver to the plaintiffs 90,000 A twill gunny bags 44 × 26½, on receiving payment for the same at Rs. 21-8 per 100 bags. On the same day the defendant made out a bill of difference against the plaintiffs for the sum of Rs. 2,362-8, being the amount of difference on the value of the 90,000 bags, at Rs. 2-10 per 100 bags, between Rs. 24-2, the price at which the plaintiffs bought from the defendant, and Rs. 21-8, the price at which the defendant had bought from the Mills.

The defendant having previously tendered the delivery order and the bill to the plaintiffs, on the 4th September sent them a letter calling upon them to pay Rs. 2,362-8 by the next day, and stating that in default of such payment being made, he would sell the delivery order on the plaintiffs' account and hold them liable for any loss sustained.

On the 5th September the plaintiffs by letter of that date refused the delivery order and bill on the ground that the delivery order had not been accepted by the Mills, and at the same time offered to pay the amount of the difference on receiving a delivery order accepted by the Mills.

The defendant did not sell the delivery order, but disposed of the bags in different quantities at different times.

On the 9th September 1891 the plaintiffs wrote to the defendant tendering Rs. 2,362-8, and requested that the delivery order should be made over to them. The defendant, however, refused to comply with this request. Subsequently, and at the end of each month from October 1891 to March 1892, the plaintiffs tendered to the defendant the sum of Rs. 3,468-12, the value of 15,000 bags, at Rs. 23-2 per 100, deliverable during each of these months; and having received neither the delivery order nor the goods, instituted this suit for damages.

The learned Chief Judge was of opinion that the defendant sold to the plaintiffs not only a delivery order, but his right to obtain from the Mills 90,000 A twill bags deliverable in lots, 15,000 per month, between October 1891 and March 1892, at Rs. 21-8 per 100 bags, after payment by the plaintiffs to the defendant of Rs. 2,362-8 for the delivery order; and that the defendant was not bound by the terms of the contract to tender a "pucka" delivery order, *i.e.*, a delivery order showing on the face of it that it had been accepted by the Mills, but that he impliedly undertook that the Mills should accept the delivery order and deliver the goods in terms thereof when presented by the plaintiffs to the Mills; and that by the terms of the contract the defendant was not bound to tender the delivery order "at once" to the plaintiffs, nor were the latter bound to receive it "at once," but were entitled to get the delivery order at any reasonable time before the first monthly delivery of the goods became due; and that although the plaintiffs were not justified in objecting, as they did at first, to the delivery order on the ground that it did not purport to have been accepted by the Mills, yet when on the 9th September they tendered to the defendant the amount of the difference bill and asked for the delivery order, the defendant should have given it to them; and that the plaintiffs, having received neither the delivery order nor the goods, were entitled to a decree for the amount claimed.

The learned Judge, however, at the request of the defendant's Counsel, made his judgment contingent on the opinion of the High Court, as to whether the plaintiffs' first refusal of the delivery order and their letter of the 5th September 1891 entitled the defendant to rescind the contract.

1893

RAMDEO v. CASSIM MAMOOJEE.

Mr. *Henderson*, for the defendant, contended that the defendant only sold a delivery order; that it was not a condition precedent that the delivery order should be first accepted by the Mills; that it was no good ground of objection that the order tendered to the plaintiffs was a "kutcha" order, *i.e.*, not one on the face of it accepted by the Mills; and that, the plaintiffs having at first refused the order, the defendant was justified in cancelling the contract; that the subsequent tender on the 9th September by the plaintiffs to the defendant of Rs. 2,362-8 for the delivery order was too late.

Mr. *T. A. Apcar* for the plaintiffs.

The judgment of the Court (PETHERAM, C.J., NORRIS and O'KINEALY, JJ.) was delivered by

PETHERAM, C.J.—The question which we are asked in this case is, whether or not the plaintiffs' first refusal of the delivery order and their letter of the 5th September 1891 entitled the defendant to rescind the contract. In my opinion the answer to that question is, that it did not so entitle him. The facts of the case are fully set out in the reference of the learned Small Cause Court Judge; and, therefore, it is not necessary to recapitulate them here. It is sufficient to say that I agree with the Small Cause Court Judge in thinking that upon this contract the defendant had no right to call upon the plaintiffs to accept the delivery order of the whole of the goods at that time. In addition to that, I do not think that the letter of the plaintiffs was such repudiation of the contract as to entitle the other party to say that it was at an end. I think the Small Cause Court Judge was right in the view he has taken of the case. This answer will be sent to the Small Cause Court.

Attorney for plaintiffs: Mr. *Pittar*.

Attorney for defendant: Babu *N. C. Bural*.

T. A. P.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

HOSSAIN ALI MIRZA *v.* ABID ALI MIRZA AND OTHERS.*

1893 *September 6.*

Security for costs—Civil Procedure Code (Act XIV of 1882), s. 380—Cantonment of Secunderabad.

For the purposes of section 380 of the Code of Civil Procedure, the British Cantonment of Secunderabad is a place out of British India.

THIS was an application on notice under section 380 of the Code of Civil Procedure made by nine of the defendants in a suit brought to set aside, or in the alternative to construe, the will of one Nawab Sir Ikbaldowla and for certain declarations therein. The plaintiff was described in the plaint as "residing at Hyderabad, but is now residing at No. ——— in the town of Calcutta," without further address, and in another application made by him in the High Court he had been then described as "residing at Hyderabad, Deccan, in the dominions of His Highness the Nizam of Hyderabad, and at that time residing at 93, Russapagla Road, Bhawanipur"; and the defendants alleged that he was now a resident of Hyderabad, where he had resided for many years, and had taken up a temporary residence in Calcutta merely for the purpose of filing this suit and had since returned to Hyderabad; and that he possessed no immoveable property in British India independently of the property claimed in the suit.

The plaintiff in his affidavit stated that he was a British subject and had for the last 10 years removed from Hyderabad to the British Cantonment of Secunderabad, and had become a permanent resident in such cantonment, which was within British territory.

Mr. *Pugh* in support of the application contended that Secunderabad was not British territory, and that it had never been ceded to the Crown: he referred to *Mahomed Shuffi* v. *Laldin Abdula* (1) and distinguished the case of *Triccam Panachand* v.

* Original Civil Suit No. 207 of 1893.

(1) I. L. R., 3 Bom., 227.

1893

HOSSAIN ALI MIRZA v. ABID ALI MIRZA.

Bombay, Baroda and Central India Railway Company (1) from the present case.

Mr. *O'Kinealy, contra*, relied on *Triccam Panachand* v. *Bombay, Baroda and Central India Railway Company* (1).

SALE, J.—This was an application made by some of the defendants, under section 380 of the Code, for an order that the plaintiff do furnish security for all costs incurred and likely to be incurred by the defendants in this suit. The applicants have referred to the title of the suit in which the plaintiff is described "as residing at Hyderabad", and to an application which was made by the plaintiff in connection with a suit between the present defendants in which he is described as "residing at Hyderabad, Deccan, in the dominions of His Highness the Nizam of Hyderabad", and they have pledged themselves to the statement in their affidavit that the plaintiff is residing out of British India and "does not possess any immoveable property within British India independent of the property claimed in this suit." The plaintiff, who claims to be a British subject, in his affidavit in answer says, that ten years ago he removed from the City of Hyderabad to the British Cantonment of Secunderabad and became a permanent resident of such Cantonment, and he adds that the British Cantonment of Secunderabad is within British India. He does not say that he has any other residence in British India, or that he possesses immoveable property within British India independent of the property claimed in this suit. Therefore, the only question I have to determine is whether or not he is a person residing within British India. This depends upon whether or not the Cantonment of Secunderabad forms part of British India.

Article 4 of the Hyderabad Treaty No. 42 of 1798, which is referred to in Aitchison's Treaties, Volume V, page 174, provides that a place within the territories of the Hyderabad State shall be fixed upon as a Cantonment for the British Government. Secunderabad was the place fixed upon under that treaty, and it became a British Cantonment, but it does not necessarily follow that it also became British territory. In order to obtain information as to the circumstances under which it came into existence as a British

(1) I. L. R., 9 Bom., 244.

Cantonment, and the real character of its connection with the British Government, the Registrar at my request wrote to the Foreign Office. The reply, that it is still the property of the Nizam and is not considered to be within British India, was communicated to the parties. So far as appears, there never has been any actual cession of territory by the Hyderabad State for the purposes of a Cantonment. This fact distinguishes this case from that relating to the Wadhwan Cantonment (1). It appears from Macpherson's List of British Enactments in force in Native States, that the British Government exercises in the Cantonments of Secunderabad powers similar to those which it exercises in British India; but it also appears from a notification, No. 4591I., dated 21st November 1888, referred to at page 195 of Macpherson's List of British Enactments in force in Native States, that the powers exercised in the Secunderabad Cantonment have been exercised under sections 4 and 5 of Act XXI of 1879, being the Foreign Jurisdiction and Extradition Act, which sections regulate the exercise of any power or jurisdiction which the Governor-General in Council has within any country or place beyond the limits of British India. There is, so far as I am aware, nothing to show that territorially the Secunderabad Cantonment has ever ceased to be part of the Hyderabad State, or that it has ever become vested in Her Majesty within the meaning of the General Clauses Act, I of 1868. That being so, I must, for the purposes of section 380, regard the British Cantonment of Secunderabad as being a place out of British India. As the result, an order will be made in terms of section 380 requiring the plaintiff to furnish security to the satisfaction of the Registrar. The costs of the application will follow the result.

Application allowed.

T. A. P.

Attorneys for applicants: Messrs. *Harris and Simmons.*

Attorney for the plaintiffs: Babu *Gonesh Chunder Chunder.*

(1) I. L. R., 9 Bom., 214.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1893 *March* 28.

DHUNPUT SINGH AND OTHERS (PLAINTIFFS) *v.* PARESH NATH SINGH AND ANOTHER (DEFENDANTS).*

Parties—Suit by some of a class as representatives of class—Suit by numerous plaintiffs—Civil Procedure Code, 1882, *s.* 30—*Leave to institute suit—Right of suit.*

Section 30 of the Civil Procedure Code does not require an "express" permission to be recorded by the Court, but if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an Appellate Court may (where an objection that no permission was given is taken on appeal) infer from such proceedings that permission was really granted.

The *dictum* of Stuart, C.J., in *Hira Lal* v. *Bhairam* (1) dissented from.

THE only point material to this report was as to whether the permission of the Court under section 30 of the Civil Procedure Code to institute a suit must be one expressly given and recorded by the Court, or whether it may be a constructive permission. For this purpose the facts are sufficiently stated in the judgment of the Court.

Mr. *Woodroffe*, Dr. *Rash Behari Ghose*, Babu *Dwarka Nath Chuckerbutty*, and Babu *Madhabanand Bysack* for the appellants.

Mr. *Jackson*, Mr. *T. A. Apcar*, Babu *Taruk Nath Sen*, Babu *Mohini Mohan Roy*, Babu *Rajendra Nath Bose*, Babu *Dwarka Nath Mukerjee*, Moulvie *Mahomed Yusuff*, Babu *Karuna Sindhu Mukerjee* and Babu *Jogendra Chandra Ghose* for the respondents.

On the point of law as to section 30 of the Code, the following cases were cited:—*The Oriental Bank Corporation* v. *Gobind Lall Seal* (2); *Jan Ali* v. *Ram Nath Mundul* (3); *Geerveballa Dabee* v.

* Appeal from Original Decree No. 280 of 1890, against the decree of C. B. Garrett, Esq., District Judge of 24 Pergunnahs, dated the 8th of September 1890.

(1) I. L. R., 5 All., 602. (2) I. L. R., 9 Calc., 604.
(3) I. L. R., 8 Calc., 32.

Chunder Kant Mookerjee (1); *Haradhone Dass* v. *Ramdoyal Rai* (2); *Nityanund Ghose* v. *Mohendro Kristo Ghose* (3); and *Hira Lal* v. *Bhairon* (4).

(1) I. L. R., 11 Calc., 213.

(2) Appeal from appellate decree No. 176 of 1889, decided on 25th February 1890, by Prinsep and Trevelyan, JJ. It was a suit by two persons for possession of certain lands alleged in the plaint to be the common property of the residents of three villages, and the place where the remains of religious devotees were interred, and the plaint stated that the said land had been from a long time assigned for the performance by the people of the said villages of "*Harisankristan*," and for the making of offerings to *Mohaparbhu*; that the plaintiffs, and before them their ancestors, had been from time immemorial in open and uninterrupted enjoyment of the said rights, and that the defendants had prevented them from such enjoyment of their rights, and had thereby dispossessed the plaintiffs. The plaint prayed that the land might be declared to be the common property of the residents of the three villages. Both the Lower Courts held the suit to be not maintainable, inasmuch as the plaintiffs were suing as representatives of the residents of the three villages, and had not obtained the permission of the Court under section 30 of the Code to institute the suit. The High Court dismissed the appeal, holding that the view of the Lower Appellate Court was correct.

(3) Appeal from order No. 368 of 1888, decided on 20th February 1889, by Pigot and Beverley, JJ. In this case the plaintiffs sued on behalf of themselves and other villagers for a declaration of their right to use a road running over a piece of land belonging to the defendants, and to remove an obstruction placed by the defendants on it. The first Court held that the suit was not maintainable with reference to section 30 of the Code, as the permission of the Court to sue had not been obtained. The Lower Appellate Court reversed this decision and made an order remanding the case to the first Court. On appeal from this decision the High Court said, "As we read the plaint, this is a claim arising out of a user extending over a period of 20 years by the inhabitants of a particular village to the right of way which is claimed; this is not a public road as stated in the plaint, though it may well be that, having regard to the special terms of section 133 of the Criminal Procedure Code, it might have come under the terms of that section, which is perhaps not confined to what are strictly highways in England; but although not, strictly speaking, a highway, it is a path in which a large class of persons specified in the plaint are interested, and under these circumstances we think that the claim having been stated, the right alleged, and the wrong asserted, as they are in the plaint, the suit must be considered to be a suit brought on behalf of the class of persons specified in the plaint, and as leave was not given under section 30 of the Civil Procedure Code, the suit cannot be properly maintained."

(4) I. L. R., 5 All., 602.

1893

DHUNPUT SINGH v. PARESH NATH SINGH.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows :—

This appeal arises out of a suit instituted by five individuals, Roy Dhunput Singh Bahadur, Roy Boodh Singh Bahadur, Roy Budri Das Bahadur, Babu Hira Lal Johury and Babu Surbosukh Kootari, on behalf of the Jain Situmbary Society, against Rajah Paresh Nath Sing and Mr. R. H. Boddam.

The case made in the plaint is, that the Jains following the Situmbary faith from a very ancient time, held under the Mahomedan Government, and still hold, exclusive possession of the Paresh Nath hill and the plain below, in the district of Hazaribagh; that they used the said hill as a place of worship, devotion, and pilgrimage, and have constructed buildings and set up *thakurs* at their own cost. The plaint then goes on to refer to certain suits and proceedings in Courts between the Jains and the Rajah defendant, which will be noticed later on in detail, as also to an agreement by way of amicable settlement, which was entered into between the parties on the 19th May 1892; and to a further agreement on the 21st September 1878, confirming and ratifying the agreement of May 1872, and it (the plaint) then states that on the 14th October 1876, the Rajah, alleging that the hill Paresh Nath appertained to Godi-palgunj, unlawfully granted a lease to Mr. Boddam, conferring on him the right to select 2,000 acres of land on the said hill, and use the same for any purpose that he (Mr. Boddam) might choose; that the defendant Boddam took the lease with full notice of the agreement entered into between the Jains and the Rajah; that he has taken possession of the 2,000 acres of land on the hill and the plain below, and has set up a manufactory of hog's lard on the hill. thereby not only trespassing on the lands belonging to the Situmbary Jains, but also desecrating their place of worship, devotion, and pilgrimage, creating a nuisance, and wounding their religious feelings. The plaintiffs then proceed to state that under the terms of two imperial grants made to the Jain Situmbary sect, as well as in accordance with the agreements come to between the Jains and the Rajah defendant, Mr. Boddam is not entitled to carry on the manufacture of hog's lard on the hill. They, however, allege in one portion of the plaint that the said agreements

of 1872 and 1878 effected only an amicable settlement as regards the matter of the offerings made in the temples on the hill, and that Hurruck Chand Golocha, the executant of the agreement on behalf of the Jains, had no authority to bind the Jains by the concession of any other right in respect of the hill belonging to the Jains, and that, therefore, the Jains are not bound by any agreement except as regards the offerings. It is further alleged that the Rajah has, by the grant of the lease to Mr. Boddam, violated the terms of the agreement, and, therefore, they (the Jains) are no longer bound thereby. The plaint concludes by asking for a declaration that the Rajah had no right to grant the lease to Mr. Boddam; and that, therefore, the lease is invalid and ineffectual; for the ejectment of Mr. Boddam from the land in his possession; and for a perpetual injunction to restrain him from carrying on the manufacture of lard, or any other trade offensive to the religious feelings of the Jains, upon the hill.

There is one paragraph in the plaint which it is necessary to refer to particularly, *viz.*, the 15th paragraph. In this it is stated that the Situmbary sect of the Jains, which consists of numerous persons having the same interest in the suit, crave leave to institute it on behalf of all persons so interested under section 30 of the Code of Civil Procedure, in the name of the aforesaid plaintiffs.

The suit was defended by the Rajah upon the ground that the Paresh Nath hill and the plain below did not belong to the Jains, but to him; that the place of worship on the hill was a place of worship not only of the Situmbary sect, but also of the Digumbary and other sects of Jains; and that therefore the plaintiffs, who represent only one section of the Jains, had no right to bring the suit; that the title deeds upon which the plaintiffs rely in support of their case were untrue; that by the *ikrarnamahs* of 1872 and 1878 he was not prohibited from granting this lease in favour of Mr. Boddam; that the claim was barred by limitation; that he (the defendant) had committed no improper act whatever, but that, on the contrary, he was a friend of the Jain community; and that if the defendant Boddam had committed any improper act on the hill, there could be no objection to the same being stopped by the Court; and lastly, that the plaintiffs were bound by the agreements come to between the parties in 1872 and 1878, Hurruck Chand Golecha having then been the manager.

1893

DHUNPUT SINGH v. PARESH NATH SINGH.

The other defendant, Mr. Boddam, supported generally the written statement of his lessor, the Rajah, and stated that the Rajah had, previous to the grant to him of the lease of 1876, executed, in favour of one Mr. Peppé, a lease on the 7th September 1874; that Mr. Peppé had assigned a moiety share to this defendant; that he obtained an assignment of the other moiety from the assignees of Mr. Peppé, and that then he received in October 1876 a *mokurrari patta* of 2,000 acres of land covered by Mr. Peppé's lease from the Rajah; that he was at liberty to use the said land in any manner he pleased; that he carried on the manufacture of hog's lard at a place very far removed from the temples on the Paresh Nath Hill; that this caused no nuisance to any pilgrim, and that it was no desecration of the holy place.

The suit was instituted in the Court of the Deputy Commissioner of Hazaribagh on the 1st October 1888; and on the plaint being presented, the Court made the following order:—"Plaint to recover possession of land held by defendant No. 2, praying that under section 30, Civil Procedure Code, the plaintiffs might be permitted to carry on the suit on behalf of the Jain Situmbary society, and further praying that a temporary injunction be issued to the defendant No. 2, restraining him from carrying on the manufacture of hog's lard and other trades offensive to the religious feelings of the Jain Situmbary society, and the plaint being duly stamped and verified by the plaintiffs, suit to be registered, summons be issued to defendants for first hearing on the 3rd December 1888. Notice to be published under section 30, Civil Procedure Code, at Madhoobun, in the *Calcutta Gazette* and the *Behar Herald*, calling for objections to the granting of the permission asked for under section 30, Civil Procedure Code, and an *ad interim* injunction to be issued on defendant No. 2, restraining him from carrying on the manufacture of lard or other trades offensive to the religious feelings of the Jain Situmbary society till the decision of the suit."

Against so much of the order as granted an injunction against him, Mr. Boddam presented a petition to this Court, and on the 12th February 1889, a Divisional Bench of this Court (PIGOT and BEVERLEY, JJ.) set aside the said order and directed that the injunction be dissolved, and upon application made about the

same time by the same person, the case was ordered to be transferred from the Court of Hazaribagh to the Court of the District Judge of 24-Pergunnahs.

On the 29th June following, the District Judge laid down certain issues, and on the 4th July 1890 framed additional issues. It is only necessary to refer to some of them—(1) whether the plaintiffs had obtained the requisite permission under section 30, Code of Civil Procedure, and if not, can the suit proceed? (3) To whom does the hill Paresh Nath and the plain underneath it belong? (4) Was the defendant No. 1 competent to grant the *patta* dated 14th October 1876, and is the defendant No. 2 bound by the terms of the *ikrarnamahs* of 1872 and 1878? (5) Are the plaintiffs bound by the *ikrars* of 1872 and 1878? (9) Is Paresh Nath hill a holy place dedicated and sacred to and for the purposes and the observance of the religion of the Jain community? (12) Was the granting of the *patta*, dated the 14th October 1876, in favour of the defendant No. 2 a breach of such liability to the Jain community and in violation of the rights? Is it, as such, invalid and ineffectual? (13) Is the carrying on of the manufactory of the second defendant upon the Paresh Nath hill in the plaint referred to, repugnant injurious and offensive to the tenets and religious sentiments, and wounding to the feelings of the Jain community or the worshippers upon the said hill; and in violation of the rights of their community; and is the second defendant liable to be restrained by a perpetual injunction from carrying on the said manufactory? (14) Did the second defendant obtain the said *patta*, dated the 14th October 1876, with notice of the rights of the said community over and in respect of the said hill? (15) Does this suit lie in the absence of the Digumbary Jains? and (16) Is the suit barred by limitation?

On the same date as the additional issues were framed by the District Judge, a petition was presented on behalf of the plaintiffs that formal permission should be accorded under section 30, Civil Procedure Code, but the learned Judge declined to accede to the request, saying, "the Court sees no reason to pass an order on the application at this stage." Evidence was then gone into upon the issues raised in the case by the District Judge, and ultimately he practically decided all the issues in favour of the defendants and dismissed the suit.

1893

DHUNPUT SINGH v. PARESH NATH SINGH.

The present appeal is by the plaintiffs against the decree of the District Judge. The case was argued at great length before us by the learned Counsel on either side, and we took time to consider our judgment.

It will be convenient in the first place to dispose of the question that was discussed before us as to whether the requisite permission under section 30, Civil Procedure Code, was obtained by the plaintiffs to institute the suit on behalf of the Jains of the Situmbary sect.

The District Judge in dealing with this question, observes:—"It is true that no such order appears to have been formally endorsed on the plaint, but I think that it is evident from the advertisement in the Gazette that such an order must have been given, and this issue must, I think, be decided in the plaintiffs' favour." The advertisement that the Judge refers to was published on the 1st October 1888, and after giving the names of the parties it runs as follows:—Notice is hereby given that the plaintiffs above named have applied, under section 30 of Civil Procedure Code, for permission to sue, on behalf of the Jain Situmbary sect, the defendants named above for declaration that the defendant No. 1 has no right to grant the lease to defendant No. 2, or any other *patta*, for declaration that the *patta* granted by the defendant No. 1 to defendant No. 2 is invalid, and ineffectual for ejectment of defendant No. 2 from lands occupied by him on the Paresh Nath hill, and for perpetual injunction against defendant No. 2, restraining him from carrying on the manufacture of lard or any other trade offensive to the religious feelings of the Jains. If any person belonging to the Jain Situmbary society has any objection to the plaintiffs' carrying on the suit on behalf of the society, he should appear before this Court and submit his objections within two months of the publication hereof."

The Judge relies, we observe, upon this advertisement alone, but we are unable to take exactly the same view that he has taken; for the advertisement by itself does not show that any permission was actually given. We must, however, refer to the terms of the order itself, and what followed subsequently. It will be remembered that the plaintiffs in the 15th paragraph of the plaint distinctly asked for leave under section 30, Civil Procedure Code, to institute the suit; and the Court, on the 1st October 1888, in the

order already referred to, after referring to the leave asked for by the plaintiffs, and after stating that the plaint had been duly stamped and verified, ordered that the suit be registered, and directed that summons be issued against the defendants and notice published under section 30, Civil Procedure Code, calling for objections to the granting of the leave asked for. The difficulty that has arisen is in consequence of the last portion of the order of the Deputy Commissioner of Hazaribagh. That officer did not follow the directions given in the Code of Civil Procedure. The section runs thus: "Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties, or any other cause, such service is not reasonably practicable) by public advertisements, as the Court in each case may direct." It will be observed that the second portion of the section provides that in a case where such a suit is brought with the permission of the Court, the Court shall give notice of the institution of the suit to the parties concerned, by public advertisements, as the Court may in each case direct. What the section evidently intends is, that the Court, upon a proper case being made out for such permission, shall grant the permission, subject to any objection that might thereafter be raised by any party interested. We think that what the Deputy Commissioner really intended to do, by his order of the 1st October 1888, was to give permission, subject to such objection. The learned Counsel for the respondent, however, contended that no such permission was really given by the Court, and that the permission should have been an express permission, and he relied upon certain cases, especially upon the case of *Hira Lal* v. *Bhairon* (1) and also upon certain unreported decisions of this Court. It will be observed, however, that in these cases no permission to institute the suit was at all asked for, and there was no question that such permission was not granted; and all that these cases really lay down (with the exception perhaps of what Stuart, C.J., held in *Hira Lal* v. *Bhairon*) is that permission under section 30 is to be obtained

(1) I. L. R., 5 All., 662.

1893

DHUNPUT SINGH v. PARESH NATH SINGH.

before the suit is commenced, and that it cannot be granted subsequently. Stuart, C.J., in the case just referred to said, "No doubt the permission of the first Court may be inferred from the fact of the suit having been allowed to proceed before it, issues prepared, and the suit determined on such issues. But, however distinctly such procedure may show the Court's permission or sanction, it is, I fear, *express* and not *constructive* permission that the section requires, such express permission duly appearing on the record." But we observe that that was not the opinion of the two other Judges who sat with him, and that the order made by the Court on that occasion was to remand the case under section 562, for determination on the *merits*. We do not think that section 30 requires that an *express* permission should be recorded by the Court; we think that if permission can be well gathered from the proceedings of the Court in which the suit was instituted, the Appellate Court ought to hold that such permission was really granted. There can be no doubt in this case as to what the parties themselves actually understood by the order which was made on the 1st October 1888. The defendants, who must be taken to have been properly advised, did not raise any objection to the suit being proceeded with because permission had not been granted to the plaintiffs for instituting the suit. On the contrary, we find that the defendant, Mr. Boddam, by his application to this Court, got the case transferred from the Court of the Deputy Commissioner of Hazaribagh to the Court of the District Judge of 24-Pergunnahs, and we do not find any trace of any objection like this until we come to the date when the issues were framed. We think, upon the whole, we ought to hold that permission for the institution of the suit, on behalf of the Jain Situmbary sect, was given by the Deputy Commissioner of Hazaribagh to the plaintiffs.

Another objection was raised before us by the learned Counsel for the respondent, that the Jains of the Digumbary sect were also interested in the hill Paresh Nath, it being also their place of worship; and that the suit was bad, because it was not instituted on their behalf, nor were they made parties to it. It will be observed upon the plaint, that from the point of view of their rights, which they presented to the Court, the Jains of the Situmbary sect could not properly bring in the Digumbary

Jains into the suit, for they claim this hill as their property, and they rely upon the *ikrarnamahs* executed between themselves and the Rajah, and to which the Digumbary sect of Jains were no parties. No doubt, upon the evidence it does appear that this hill is a place of worship of the Digumbary Jains as well, but this fact does not entitle the defendants to have the suit thrown out. In the case in *Hira Lal* v. *Bhairon* (1), already referred to, Straight and Tyrrell, JJ., made certain observations which may well be referred to here, and they are as follows :—" Now, though it is admitted that the other coparceners of the plaintiff have a coparcenary or 'joint' interest with him in the subject-matter of the suit, the *shamilat* lands, there is nothing to show that they have 'the same interest' as he has 'in the suit', that they are 'so interested', in like manner, as he is. It may be indifferent to them whether the defendants usurp exclusive rights in the *shamilat*, or it may be inconvenient to them at this moment to assert their own rights. We read the first part of the section" (*i.e.* section 30, Civil Procedure Code) "as implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same."

Now in this case, it is quite plain that the five plaintiffs desired to sue on behalf of other persons, namely, the Situmbary sect of the Jains, similarly interested in suing. The Digumbary Jains are not so similarly interested. They do not claim any title to the hill itself, nor were they parties to the *ikrarnamahs* of 1872 and 1878, and they would not be bound by any decree which may be made in this case. It appears to us, therefore, that the case may well proceed without them.

[Their Lordships then proceeded to the consideration of the case on the other issues, and in the result came to the following conclusion]:—

The suit, so far as it prays for any relief or reliefs as against the Rajah defendant, must, we think, be dismissed.

The result is, that the decree of the Lower Court must be modified by decreeing that a perpetual injunction should be issued as against Mr. Boddam, restraining him from slaughtering pigs

(1) I. L. R., 5 All., 602.

1893

DHUNPUT SINGH v. PARESH NATH SINGH.

and carrying on the manufacture of lard on the hill. The suit of the plaintiffs as against the Rajah defendant having failed, they must pay his costs in this and in the Lower Court. But they will be entitled to their costs as against Mr. Boddam in both the Courts.

Decree varied.

J. V. W.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *July 10.*

UDAI CHUNDER CHUCKERBUTTY AND ANOTHER (PLAINTIFFS) *v.* ASHUTOSH DAS MOZUMDAR (DEFENDANT).*

Hindu law—Widow—Alienation by Hindu widow—Legal necessity—Pilgrimage never carried out—Debt barred by limitation.

The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property.

Chimnaji Gobind Godbole v. *Dinkar Dhondev Godbole* (1) and *Tarini Prasad Chatterjee* v. *Bhola Nath Mookerjee* (2) followed.

In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity, the alienee is sufficiently protected if he

* Appeal from Appellate Decree No. 1540 of 1891, against the decree of Babu Nobin Chunder Gangooly, Subordinate Judge of Tippera, dated the 7th of July 1891, reversing the decree of Babu Huro Mohun Bose, Munsif of Kushba, dated the 31st of July 1890.

(1) I. L. R., 11 Bom., 320.

(2) Appeal from Appellate Decree No. 45 of 1890, decided by TOTTENHAM and GHOSE, JJ., on 28th August 1891.

The judgment of the Court was as follows :—

This was a suit brought by the reversioners to the estate of one Mahanand Chatterjee in respect of certain property alienated by Rohini Debi, who was the widow of Mahanand; Rohini Debi having died in the month of Aghran 1288 (November 1881), that is, 39 years subsequent to the death of her husband, who deceased in the year 1249 (1842).

The defence was that the alienation was made for legal necessity and to enable the widow to perform a pilgrimage to Gaya and also for her own maintenance. There was a further contention that the plaintiffs were estopped from bringing this suit by certain conduct of the plaintiff Tarini Prasad Chatterjee, who sues for himself with his minor brothers. The lower Courts have concurrently dismissed the plaintiffs' suit. The Court below found that the alienation was effected by the widow in order to

satisfies himself by *bonâ fide* enquiries of the existence of such necessity, although he may be in fact mistaken. He has not to see to the application of the money.

THE facts of this case were as follows :—

The defendant at the end of 1294 (1887) purchased 10 kanis of rent-free land at a sale held in execution of decree for arrears of rent at an enhanced rate passed against the former tenant. As the defendant did not pay any rent, the plaintiffs brought a suit, on the 25th July 1888, for arrears of rent, the amount claimed being Rs. 57-13-3, and for khas possession. The defendant pleaded that he was not liable for the rent as the plaintiffs' purchase was from

obtain funds for the purpose of paying off her late husband's debts, and for her own pilgrimage to Gaya. In appeal it has been contended that the Court below was wrong in treating the husband's debts as forming any legal necessity for the alienation, inasmuch as the debts were barred by limitation. The alienation in question was only a mortgage, which was effected in the year 1279 (1872), and upon that mortgage the mortgagee obtained a decree and got the property sold. We think, however, the District Judge was right in holding that the husband's debts were sufficient to authorize the widow to raise the money in question by mortgaging property. Although the debts were barred by limitation there was, by Hindu law, a moral obligation upon the widow to satisfy the debts, if she was in possession of the assets of her husband. The authorities upon this question are: *Bhala Nahana* v. *Parbhu Hari* (1), *Chimnaji Gobind Godbole* v. *Dinkar Dhondev Godbole* (2), *Bhau Babaji* v. *Gopala Mahipati* (3), and *Kondappa* v. *Subba* (4). These cases directly support the ruling of the Judge of the Court below. On the other hand, his attention and our attention has been called to the cases of *Ram Churn Poorte* v. *Nunhoo Mundul* (5) and *Melgirappa* v. *Shivappa* (6). We think, however, that these cases are not in point, and that we are right in following the authorities cited on the other side. The case of *Melgirappa* v. *Shivappa* was considered later in the case of *Bhau Babaji* v. *Gopala Mahipati* (3).

As to the pilgrimage to Gaya, that was no doubt also a pious duty on the part of the widow, and justified her incurring some debts to be a charge upon her husband's estate. It is not necessary, therefore, to consider the question of estoppel, as to which we may say we are not entirely in agreement with the Court below. But upon the other grounds stated, we think the decree of the lower Appellate Court was right in law, and this appeal must be dismissed with costs.

(1) I. L. R., 2 Bom., 67.
(2) I. L. R., 11 Bom., 320.
(3) I. L. R., 11 Bom., 325.
(4) I. L. R., 13 Mad., 189.
(5) 14 W. R., 147.
(6) 6 Bom. A. C., 270.

1893

UDAI CHUNDER CHUCKERBUTTY v. ASHUTOSH DAS MOZUMDAR.

one Umatara, a Hindu widow with only a life interest, and that he had himself purchased the taluk from the reversioners.

The Munsif held, without going into evidence, that, as the defendant had purchased the holding in execution of a decree for its arrears, he had himself created the relationship of landlord and tenant, and gave the plaintiffs a decree with costs. On appeal, the Subordinate Judge reversed the Munsif's finding, and remanded the case for re-trial, on the ground that in a suit for rent, where the plaintiff's right to the rent is disputed, it is incumbent upon the Court to determine that question before a decree can be passed in the plaintiff's favour. On the re-trial the Munsif gave the plaintiffs a decree on the ground that their title was a good one, as they had purchased from a Hindu widow who sold the property in order to liquidate her husband's debts and for purposes of a pilgrimage to Gaya which, however, she never carried out. On appeal, the Subordinate Judge reversed the finding of the Munsif on the grounds that there was no legal necessity, as the widow did not go to Gaya on pilgrimage; that the debt of her husband, which she paid, was a debt barred by limitation; and that she did not need maintenance as her brother was maintaining her.

From this decision the plaintiff appealed to the High Court.

Babu *Gobinda Chunder Das* for the appellants.

Babu *Durga Mohun Das* for the respondent.

Babu *Gobinda Chunder Das* :—The sale by the widow was made for valid reasons, which amounted to legal necessity, and if so, the plaintiffs' title is a good one. The alienation to the plaintiffs was made for three reasons—1st, to perform her husband's *shrad* ceremonies and to go on pilgrimage to Gaya; 2nd, in order to pay her husband's debts; and 3rd, in order to maintain herself. The lower Appellate Court accepts the fact of the existence of the debts and that they were satisfied, but holds that as they were barred by limitation, there was no necessity to liquidate them. Limitation does not affect the sacredness of the obligation to liquidate the debts; besides, it has been held in *Chimnaji Gobind Godbole* v. *Dinkar Dhondev Godbole* (1) and *Tarini Prasad Chatterjee* v. *Bhola Nath Mookerjee* (2) that the payment of the husband's debts, though

(1) I. L. R., 11 Bom., 320. (2) See note (2), *ante p.* 190.

barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her husband's property. That alone is sufficient to make the sale to the plaintiffs a good one. The fact that the plaintiff did not go to Gaya does not affect the question of legal necessity, her intention was to go and the sale was made for that purpose, but she liquidated her husband's debts first. Then there was the further ground that she alienated the property for her maintenance which she was legally entitled to do. For these reasons it should be held that the sale conferred a good title on the plaintiffs.

Babu *Durga Mohun Das* for the respondent:—The main ground which was supposed to form the necessity for the widow selling the property, was that she wished to go to Gaya to perform the *shrad* ceremonies of her husband. It is admitted that she never went. Therefore that necessity never existed. If the purchase money was given to her for that purpose, it should have been used in that way. The second alleged necessity, namely, to liquidate her husbands debts, is also not tenable. In the first place, the debts in question were barred by limitation, and there was no necessity to pay them as they could never be demanded, and the person to whom the money was due was her own brother. That necessity therefore was not a valid one. Her last ground for selling was also a false one, as she was being maintained by the very brother to whom she paid the amount to liquidate her husband's debts. No legal necessity ever existed, and the sale was a fraud on the reversioners.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The plaintiffs as purchasers of a rent-free tenure from one Umatara, the widow of Bholanath Chuckerbutty, to whom the tenure originally belonged, brought this suit for arrears of rent due in respect of a jote situated within the rent-free tenure. The defendant, who had purchased the jote in execution of a decree for arrears of rent against the former jotedar, and who had subsequently purchased the rent-free holding from the reversionary heirs of Umatara after her death, resisted the plaintiffs' claim, on this ground, amongst others, that the plaintiffs did not

1893

UDAI CHUNDER CHUCKERBUTTY v. ASHUTOSH DAS MOZUMDAR.

acquire any title by their purchase from Umatara which could be binding against the reversioners, and that, upon Umatara's death, they had ceased to have any interest in the rent-free holding.

The first Court decided the question thus raised and the other questions arising in the case, in favour of the plaintiffs and gave them a decree.

On appeal, the lower Appellate Court has held that the plaintiffs did not acquire, by their purchase from Umatara, any interest in the rent-free holding which could be binding on the reversioners, as there was no real necessity for any alienation by her; and therefore, without going into the other questions arising in the case, it has dismissed the suit.

In second appeal it is contended for the plaintiffs, that the lower Appellate Court was wrong in law in holding that the sale by Umatara was without necessity; and we think this contention is sound. The learned Subordinate Judge observes with reference to the two purposes for which the sale was made, *viz.*, the performance of Umatara's husband's *shrad* at Gaya, and the payment of his debts, that as Umatara did not go to Gaya, and as the debts were barred by limitation, the alleged necessity for the alienation did not exist.

With regard to the first matter, the learned Subordinate Judge observes, "when the widow did not go to Gaya, she had no necessity for the sale. In such a case, I think the purchaser ought to see that the widow really goes to Gaya, and does not cheat the reversioner by false pretext."

We do not think that this view of the law is correct. In cases like this, if the purchaser believes in good faith that the widow, when making the alienation, professed to do so for the purpose of raising money, for going to Gaya and performing her husband's *shrad*, he is not bound to see to the application of the purchase money.

Then as to the second point, we think that the learned Subordinate Judge is equally in error. It has been held by the Bombay High Court, in the case of *Chimnaji Gobind Godbole* v. *Dinkar Dhondev Godbole* (1), that the payment of the husband's debts,

(1) I. L. R., 11 Bom., 320.

1893

UDAI CHUNDER CHUCKERBUTTY v. ASHUTOSH DAS MOZUMDAR.

though barred by limitation, is a pious duty, for the performance of which a Hindu widow may alienate her husband's property, and the same view was taken of the law by this Court in an unreported case, being appeal from the Appellate Decree No. 45 of 1890 (1), and that we think is the correct view of the law. As the Court of appeal below accepts the first Court's finding as to the existence of the debt, and as to its satisfaction out of the purchase money, we think, upon the facts found in this case, we must hold that the alienation by Umatara to the plaintiffs, conveyed to them an absolute title. That being so, the decree of the lower Appellate Court must be set aside, and the case remanded to that Court for the trial of the other questions arising in it.

The appellants will have their costs of this appeal. The other costs will abide the result.

Appeal allowed and case remanded.

C. S.

Before Mr. Justice Ghose and Mr. Justice Gordon.

HARA COOMAR SIRCAR (PETITIONER) *v.* DOORGAMONI DASI (OBJECTOR).*

1893 *Sept.* 4.

Probate—Application for, and grant of, probate—Probate and Administration Act (V of 1881)—Discretion of Court as to refusal to grant probate—Executor.

Where on application for probate by a person appointed executor by the will, the genuineness of the will is not disputed, and the applicant is a person not legally incapable, the Court acting under the Probate and Administration Act (V of 1881) has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit and proper person to be appointed executor.

The facts of this case are set out in the judgment of the Lower Court, which was as follows:—

"This is an application for probate of the will of one Dhan Krishna Sircar by one Hara Coomar Sircar. The opposite party is one Doorgamoni, widow and executrix of the said testator. The admitted facts are that

* Appeal from Original Decree, No. 204 of 1892, against the decree of A. E. Staley, Esq., District Judge of Backergunge, dated the 8th of July 1892.

(1) See note (2), *ante p.* 190.

1893

HARA COOMAR SIRCAR v. DOORGA-MONI DASI.

Dhan Krishna died in 1296 (1889), leaving a will under which Doorgamoni and one Jagobundhu were to be his executors, and Hara Coomar Sircar was to collect rents under them as manager of the estate; and that on the death of Jagobundhu, Hara Coomar was to become executor. Jagobundhu and Doorgamoni obtained probate. Jagobundhu died on the 14th of Aghran 1298 (29th November 1891). Now, in accordance with the will, Hara Coomar asks to be appointed executor in place of the deceased Jagobundhu. This is resisted by the executrix on the ground that until Hara Coomar renders accounts of his collections he ought not to be appointed executor. Hara Coomar denies having made any collections. The evidence produced, in my opinion, sufficiently proves that Hara Coomar has made collections. Receipts given by him to tenants amounting to nearly Rs. 160 have been proved. He admits giving them, but denies taking the money, and says he only signed for Jagobundhu, who took the money. He has not produced any evidence to support this statement. A tenant has in respect of three of the receipts stated that he paid the money to Hara Coomar himself. But the evidence which is conclusive against Hara Coomar is that of Babu Kali Coomar Bose, pleader of this Court, and Bhugwan Chunder Guha, a respectable talukdar. These state that Hara Coomar agreed to give the executrix accounts from the death of Dhan Krishna, the testator, in their presence, and admitted the collections. Under these circumstances it would, in my opinion, be inequitable to appoint Hara Coomar executor. He has made collections and denied them; undertaken to render accounts and has failed to redeem his promise. No law has been shown me which requires me to appoint him under such circumstances as executor. To appoint him as executor now would be to the detriment of the estate, and would enable him to resist the demand of the executrix for accounts and settlement. The application is accordingly dismissed with costs."

From this decision Hara Coomar Sircar appealed to the High Court, on the grounds that the Judge had erred in law in refusing probate to him in spite of his appointment as executor under the will of the testator; that the reasons assigned by the Judge for refusing probate were neither valid nor sufficient; and that the Judge had erred in holding that to appoint the petitioner "as executor would be to the detriment of the estate and would enable him to resist the demands of the executrix for accounts and settlement."

Babu *Jogesh Chunder Roy* for the appellant.

Babu *Srinath Das* and Babu *Chunder Kant Sen* for the respondent.

The arguments are sufficiently stated in the judgment of the Court (GHOSE and GORDON, JJ.), which was as follows:—

This is an appeal from an order of the District Judge of Backergunge dismissing an application for probate of the will of one Dhan Krishna Sircar. The application was made under the following circumstances:—Dhan Krishna Sircar died on the 3rd April 1889. On the 27th March 1889 he executed a will, which was duly registered on the 29th of that month. By this will, he devised the bulk of his estate to his minor grandson Pratap Chandra Sircar, and he appointed as his executors his brother Jagobundhu Sircar and his wife Doorgamoni; and he also appointed his nephew Hara Coomar Sircar (son of a deceased brother Tarini Charan Sircar) to manage the collection business of his estate: and the last paragraph of his will runs thus:—"If before Sriman Pratap Chandra Sircar attains majority Jagobundhu dies, then Hara Coomar Sircar will be executor in his place; and in case of Doorgamoni's death the minor's mother Nistarini will be executrix in her place. Be it noted that there must be two executors in the way stated above to the *ijmali* estate till Sriman Pratap Chandra Sircar attains majority."

After the death of Dhan Krishna, Doorgamoni and Jagobundhu applied to the District Judge for probate of his will, which was granted to them on the 25th June 1889. Jagobundhu died on the 29th November 1891, and on the 17th February 1892 the present application for probate was filed by Hara Coomar Sircar. The application is opposed by Doorgamoni, the widow of the testator and sole surviving executrix, to whom, as we have already said, probate was granted jointly with Jagobundhu on the 25th June 1889. The grounds on which she opposes the application are that, although the applicant has as manager been making collections of the rents of the estate for the years 1296 and 1297, he has omitted to submit to the executors any accounts of those collections; that he has misappropriated a large sum of money belonging to the estate, and has refused to render accounts; and that for these reasons he has caused loss to the minor and is not a fit and proper person to be appointed executor. The applicant Hara Coomar denies having made any collections. He gave his evidence and several witnesses were examined for the objector; and the learned District Judge finds

1893

HARA COOMAR SIRCAR v. DOORGA-MONI DASI.

on this evidence that Hara Coomar actually made collections from the tenants of the estate, and he undertook to render accounts and has failed to fulfil his promise, and that under these circumstances he is unfit to be appointed executor. "To appoint him," says the District Judge, "as executor now would be to the detriment of the estate, and would enable him to resist the executrix's demands for accounts and settlement." The District Judge accordingly dismissed Hara Coomar's application, and he appeals.

The District Judge's finding of fact is not challenged before us on appeal, but the learned pleader for the appellant argues that the District Judge had no discretion to refuse probate; in other words, that as the genuineness of the will is not disputed, and the petitioner is not legally incapable (*e.g.*, he is not a minor or of unsound mind), the District Judge was bound to give effect to the wishes of the testator as expressed in his will appointing the petitioner as executor on the death of Jagobundhu, and therefore to grant probate to him.

We have carefully considered this question and we think that this argument is sound. We have been referred by the learned pleaders on both sides to several sections of the Probate and Administration Act, V of 1881, as bearing upon this particular matter, but we are unable to find any provision in the Act which gives the District Judge any discretion to refuse an application for probate by an executor named in the will on the ground that, in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. It is noteworthy that, under the Act, probate can only be revoked for "just cause" (see section 50), and that unfitness or incompetency of an executor does not fall within the meaning of "just cause" as explained in that section; so that apparently an executor, however unfit or incompetent he may be, cannot be removed by the Court from his post, though no doubt he may be removed for the reason given by the Judge for holding the petitioner in this case to be disqualified, *viz.*, the omission to exhibit an account of the assets which have come into his hands. But this refers expressly to the revocation of a probate after it has been granted, and can have no application to the conduct of the executor before the probate is granted, and much less to the conduct of a person, who, like the petitioner,

occupied the position of a manager. Again, sections 22, 41, and 85 of the Act give the Court discretion to grant to any one of the persons entitled to the estate of an intestate, or to a third party, letters of administration, or to make an order refusing to grant any application for letters of administration. But the Act nowhere provides for any such discretion being exercised in the case of an application for probate by an executor named in the will and considered qualified by the testator to act as such. And we do not think that a Court acting under the Probate and Administration Act has any more discretion than a Court of Probate has in England, where it seems to have been held that a person convicted of felony, or one who is attainted or outlawed, may maintain a suit for establishing the validity of a will by which he is appointed executor (see *Smethurst* v. *Tomlin* (1), *In the goods of Samson* (2), and Williams on Executors, 8th ed., Vol. I, p. 239).

The learned pleader for the respondent contends that an executor is in fact a trustee, and that as such a Court of Equity can either grant or refuse him probate at its discretion. We think, however that this contention is not sound. An executor may no doubt be regarded as occupying the position of a trustee for the purpose of administering the estate, and he may also be a trustee under a will appointing him executor and creating the trust, but that is quite a different matter from saying that an executor *qua executor* is a trustee. The true position, powers, and duties of an executor are essentially different from those of a trustee. We think, therefore, that the District Judge was bound to grant probate to the applicant in this case. As to the observation of the District Judge that to appoint the petitioner to be an executor would be to the detriment of the estate, and would enable him to resist the executrix's demand for accounts, all that we need say is that such a consideration cannot and ought not to influence the action of the Court when the petitioner was named as an executor by the testator. Whether or no the petitioner may be compelled to render accounts in a suit properly framed for the purpose by the executrix, or how otherwise the monies in his hands may

(1) 30 L. J. Pro., 269 ; 2 Sw. & Tr., 143.

(2) L. R., 3 P. & D., 48.

1893

HARA COOMAR SIRCAR v. DOORGA-MONI DASI.

be realized, is, however, a question which we are not called upon to discuss in the present case.

The appeal will accordingly be decreed. The applicant will be granted probate of the will of Dhan Krishna Sircar, and we think the proper way to give effect to this order will be to substitute the applicant's name for the name of Jagobundhu, deceased, in the probate already granted to him and Doorgamoni jointly, and which we observe was filed in the Court of the District Judge with the application in this case.

We make no order as to costs.

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1893 *Sept.* 8.

CLARK *v.* ALEXANDER.*

Sale in execution of decree—Rateable distribution—Attachment of salary —Civil Procedure Code, 1882, *ss.* 285, 295—*Attachment by Small Cause Court—Transfer of decrees to superior Court.*

Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution proceedings to the superior Court, adopted and held supported by the cases of *Gopee Nath Acharje* v. *Acheha Bibee* (1), *Bykant Nath Shaha* v. *Rajendro Narain Rai* (2), and *Bhugwan Dass Bogla* v. *Bunko Behary Bajpie* (3).

Muttalagiri Nayak v. *Muttayyar* (4) and *Nimbaji Tulsiram* v. *Vadia Venkati* (5) not followed.

ON the 13th February 1893 the plaintiff obtained in the High Court a decree against the defendant for Rs. 9,979-4.

In execution of this decree, under an order of the 11th April 1893, the plaintiff attached a moiety of the salary of the defendant, who was a member of the Bengal Pilot Service, and in accordance with an order obtained by the plaintiff on the 22nd May 1893, the Accountant-General on the 4th July paid into Court

* Original Civil suit No. 30 of 1893.

(1) I. L. R., 7 Calc., 553.
(2) I. L. R., 12 Calc., 333.
(3) Suit No. 130 of 1884, unreported.
(4) I. L. R., 6 Mad., 357.
(5) I. L. R., 16 Bom., 683.

to the credit of the suit a sum of Rs. 975-14-4, representing two monthly moieties of the defendant's salary which had come to the hand of the Accountant-General.

The plaintiff, having obtained the usual certificates from the Sheriff of Calcutta and from the Registrar of the High Court that no other attachments had been issued or applications in execution made against the defendant in the High Court, applied to Mr. Justice Sale, in Chambers, to withdraw the sum of Rs. 975-13-7, standing to the credit of the suit.

BENGAL SECRETARIAT LIBRARY.

It, however, appeared that prior to the order of the 22nd May, but subsequent to the plaintiff's attachment, several other attachments were in existence on the moiety of the defendant's salary issuing from the Calcutta Court of Small Causes, two of the said attachments having been obtained in execution of decrees transferred from the Court of the 1st Munsif of the 24-Parganas to the Calcutta Court of Small Causes for execution, and the others in execution of decrees of the Calcutta Small Cause Court itself. These attaching creditors had not, however, transferred their decrees for execution to the High Court; on this application coming on in Chambers, Mr. Justice Sale directed that it should stand over and be renewed upon notice to all outside creditors. After service of summons on these creditors the application was renewed.

Mr. *Acworth* for the applicant:—My client is entitled to the whole fund; the money has been realized under section 295 of the Code, and no other creditors have applied for execution. I rely on *Muttalagiri Nayak* v. *Muttayyar* (1), *Nimbaji Tulsiram* v. *Vadia Venkati* (2), and on *Krishnashankar* v. *Chandrashankar* (3), and refer to *Gopee Nath Acharje* v. *Achcha Bibee* (4).

Mr. *O'Kinealy* for the Small Cause Court creditors:—Section 295 has no application, but the section applicable is 285; the rights of all the creditors should be determined, and the fund rateably divided amongst them.

SALE, J.—This was an application by the plaintiff for an order that a sum of Rs. 975-13-7, now in Court standing to the credit of this suit, be paid to him in part satisfaction of the decree obtained

(1) I. L. R., 6 Mad., 357.
(2) I. L. R., 16 Bom., 683.
(3) I. L. R., 5 Bom., 198.
(4) I. L. R., 7 Calc., 553.

1898

CLARK v. ALEXANDER.

by him in this suit. The money represents salary which was attached in the hands of the Accountant-General of Bengal. There were, it appears, five attachments made by the Calcutta Court of Small Causes, under s. 285 of the Code, in execution of three of its own decrees and two decrees of a mofussil Court sent to it for execution.

Under these attachments a moiety of the salary of the defendant, who is in the Pilot Service, was from time to time realized by the Small Cause Court in part satisfaction. Before full satisfaction could be obtained, an attachment was made by this Court in execution of the decree in this suit, which was followed by an order for payment of the money so attached into this Court to the credit of this suit. That order was made without notice to the outside decree-holders, although there was a certificate of the Accountant-General of Bengal showing that the money was subject to existing attachments on the part of these outside creditors. I therefore thought it right that notice of this application should be given to all these creditors, some of whom have now appeared and claim to participate with the petitioner in the fund which he seeks to have paid out to him. The only other material fact is that the petitioner is the only judgment-creditor who has applied for execution to this Court.

Upon these facts it was contended, on the part of the petitioner, that the money had been realized under s. 295 of the Code, and that, as the petitioner was the only creditor who had applied for execution to this Court, he alone was entitled to the whole fund to the exclusion of the outside attaching creditors, who in fact were excluded by the terms of the section.

On the other hand, it was said that the section applicable to the facts of this case was s. 285 and not s. 295, and that the realization in this case should be treated as having been made under the former section, which requires the Court to consider and determine the rights of all creditors who have attached the property realized under that section, and that the fund ought to be distributed rateably amongst all of them.

In support of the contention on the part of the plaintiff, two cases were cited: the case of *Muttalagiri Nayak* v. *Muttayyar* (1)

(1) I. L. R., 6 Mad., 357.

and the case of *Nimbaji Tulsiram* v. *Vadia Venkati* (1), which followed the former case.

After careful consideration of these cases I have come to the conclusion that the contention made on behalf of the outside creditors is the correct one. To give s. 295 the signification contended for by the plaintiff would, in my opinion, have the effect of altogether nullifying s. 285. The duty of the superior Court under s. 285 is to consider and determine the rights of the attaching creditors in all the cases to which that section applies, whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim determined he must obtain a transfer of his decree to the superior Court and apply to that Court for execution. If that were required, it would operate with great hardship in the case of creditors for small amounts who had attached through the Small Cause Court, especially where the attached property was of small value. The extra expense that would be incurred by reason of the transfer to the superior Court and the re-attachment through that Court, would in some cases deprive the Small Cause Court creditors of all benefit arising under their attachments, and the result in those cases would be, at the least, the practical postponement of the rights of such creditors to those of creditors for larger amounts who had attached through the superior Court. It certainly would be a remarkable result if, where property is attached under s. 285, the superior Court, while required by that section to consider the rights of all attaching creditors, irrespective of the Courts by which the attachments were made, should at the same time be restricted so as to have no alternative but to apply the rule of exclusion contained in s. 295 to all creditors except those who have applied to the superior Court prior to realization, and so come strictly within the terms of that section. Such a result cannot have been intended, and may be avoided if ss. 285 and 295 be read together and due effect given to each. The specific point, whether realization should be treated as having been made under s. 285 alone, or under that section and s. 295, was not, so far as appears, raised in the cases cited on behalf of the plaintiff, or considered by the Courts. In each of those cases it would seem to have been

(1) I. L. R., 16 Bom., 683.

1893

CLARK v. ALEXANDER.

assumed that the realization was under s. 295. On the other hand, there are decisions of this Court in which this point has been considered. The case of *Gopeenath Acharje* v. *Acheha Bibee* (1) was a decision under ss. 272 and 295. In that case this was said by the Court—"It may be proper to observe" (p. 555 of the report) "that s. 295 of the Code of Civil Procedure has no application to a case of this kind. That section applies only where the decree-holders have all applied to the same Court for execution of their decrees. Now, in this case the plaintiff did not apply to the Small Cause Court Judge for execution of her decree, seeing that that decree was a decree of the Munsif and had never been transferred into the Small Cause Court for execution. Then, with reference to s. 272, we think that the Subordinate Judge has taken a proper view of the proviso, which is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in the custody of which, the property is, and not by the Court which made the order of attachment." The contention was between two attaching creditors, one of whom had attached through the Court holding the assets, the other was an outside creditor; and inasmuch as they had not applied to the same Court for attachment, the learned Judges seem to have held that s. 295 did not apply, that is, did not apply so as to exclude the rights of creditors under the earlier ss. 272 and 285.

The case is referred to in the Madras case *Muttalagiri Nayak* v. *Muttayyar* (2) as an authority for the proposition that before an attaching creditor has a right to rateable distribution under s. 295, he is bound to transfer his execution to the Court holding the assets. I cannot agree that it supports that proposition.

In another case, *Bykant Nath Shaha* v. *Rajendra Narain Roy* (3), where property had been attached both by an inferior Court and by a superior Court in the same district, and was sold first by the inferior Court and then by the superior Court, it was under all the circumstances held that the first sale by the inferior Court should not be set aside, and that the superior Court should have accepted the sale and required the purchase money to be brought

(1) I. L. R., 7 Calc., 553. (2) I. L. R., 6 Mad., 357.
(3) I. L. R., 12 Calc., 333.

in and placed under its control, "so that (as observed by the Court) it might be rateably distributed amongst all the decree-holders." In that case it was assumed that a rateable distribution was capable of being made without transfer of the execution to the Court holding the assets. And, after the best enquiry I have been able to make as to the practice of this Court, it seems to be in favour of the principle of rateable distribution amongst all the attaching creditors without any such condition as the transfer of the execution proceedings to the superior Court. In illustration of this I will refer to two unreported cases.

In a case where money was attached in the hands of a mercantile firm, first by this Court and then by the Calcutta Small Cause Court by direct attachment, and was paid into this Court, the attaching creditors made a joint application to the Court that their rights as to participation might be determined under ss. 285 and 295. It was referred to the Registrar to enquire who under these sections were entitled to the money, and that distribution be made according to the Registrar's report, after confirmation by effluxion of time or otherwise. The Registrar reported in favour of a *pro ratâ* distribution. That report was confirmed and carried out —*Bhugwan Dass Bogla* v. *Bunko Behary Bajpie* (1). It is to be observed that the reference in that case was an open one, though made on a joint application of the attaching creditors.

There was another case in which property in Calcutta, attached in execution of a decree of this Court, was taken up for public purposes. The compensation money awarded was in the hands of the Collector of the 24-Pergunnahs, who, at the request of this Court, sent the money to this Court, with the request that it should be received "for credit" of the suits in this Court, a suit of the Calcutta Small Cause Court and an execution suit in the Alipore Court. That money was attached in the hands of the Collector by a creditor who had obtained a decree in the Alipore Court. It was held by Wilson, J., that the money having been attached within the jurisdiction of the Alipore Court in execution of a decree of that Court, had been irregularly brought into this Court, yet that, having been brought into this Court, it must be deemed

(1) Suit 130 of 1884, unreported.

1893

CLARK v. ALEXANDER.

to have been realized in all the suits, and the principle of rateable distribution between all the creditors should be applied.

For these reasons I prefer to adopt the practice of this Court, supported as it seems to me to be by the authority of the cases decided in this Court which I have cited. I therefore hold that the money realized in this case should be rateably distributed between all the attaching creditors, and that their costs of appearing before me should be added to their claims respectively.

Attorney for applicant: Mr. *E. J. Fink.*

Attorneys for the Small Cause Court creditors: Messrs. *Dignam, Robinson* and *Sparkes.*

T. A. P.

Before Mr. Justice Sale.

1893 *Sept.* 11.

IN THE MATTER OF SRISH CHUNDER SINGH & OTHERS.*

Guardian—Appointment of Guardian—Infant residing out of the jurisdiction of the Court—Letters Patent, High Court, clause 17*—Guardian and Wards Act (VIII of* 1890*), ss.* 4, 7, 9*—Testamentary guardians—Jurisdiction of High Court.*

Case in which the Court refused, on a summary proceeding under clause 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the ordinary Original Civil Jurisdiction of the Court, there being testamentary guardians in existence, and no application or suit filed to remove them.

On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890.

THIS was an application made under clause 17 of the Charter of the High Court, and section 17 of the Guardian and Wards Act (VIII of 1890), by one Dabendrobala Dabee for her appointment as guardian of the person and property of her adoptive son Srish Chunder Singh, then an infant of 12 years of age.

It appeared that in October 1887 one Grish Chunder Singh died, leaving a widow, Dabendrobala Dabee, and three brothers, Poorno Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and also a son of his father's brother, Indra Chunder

* Original Civil Suit.

Singh. By his will he appointed the four persons last mentioned his executors, and, after providing for certain legacies, gave all the residue of his estate to the son who should be adopted by his widow under a power given to her for that purpose. The will further contained the following clause which bore reference to the power of adoption, *viz.*:—"If the party who is entitled to the property be under age, then the whole of my property will pass into the hands of my executors, and until the person so entitled as aforesaid shall attain the full age of 21 years, they shall manage all the property, and the duties and management and education of the said son shall be conducted under the supervision of my wife."

At the time of the death of the testator the estate, which was known as the Paikpara estate, was joint, and was in the hands of the Court of Wards. In 1879 the Board of Revenue made over the joint estate to Poorno Chunder Singh, Indra Chunder Singh, and Sarut Chunder Singh in their character as executors. Probate of the will of the testator was obtained by Poorno Chunder Singh and Kanti Chunder Singh on the 19th September 1878; and in July 1879 and March 1882 by the two remaining executors respectively.

On the 25th July 1881, Dabendrobala Dabee, in pursuance of the power given to her for that purpose, adopted one Srish Chunder Singh, one of the sons of Poorno Chunder Singh, as a son to Grish Chunder Singh.

In 1889 Sarut Chunder Singh filed a suit for partition of the joint estate; and in such suit a Receiver of the whole of the joint estate was appointed; and the Commissioner of partition therein appointed duly made his award, which at the time of the present application had not however been confirmed, owing to the award having been remitted to the Commissioner for alteration in minor details concerning certain properties situate outside the jurisdiction of the Original side of the Court. Under this award the whole of the property allotted to the minor was situate outside the jurisdiction of the High Court.

In 1889 another suit was brought by Srish Chunder Singh through his adoptive mother as next friend, against the other members of the family, which, amongst other matters, asked for an injunction restraining Sarut Chunder Singh from further

1893

IN THE MATTER OF SRISH CHUNDER SINGH.

acting as executor to the estate of Grish Chunder Singh, on the ground that he had improperly dealt with large sums of money belonging to the estate. In 1891 a decree in this suit was made directing Sarut Chunder Singh and Indra Chundra Singh to file their accounts. In February 1892 Sarut Chunder Singh filed his account, which was objected to on the grounds of insufficiency and incompleteness, and on the further ground that the estate of Srish Chunder Singh had been improperly debited with large sums which ought not to have been paid therefrom. No account was filed by Indra Chunder Singh.

It further appeared that Srish Chunder Singh was, at the time of the application and had been previous thereto, living with his adoptive mother outside the Original jurisdiction of the High Court; and it was alleged that the infant had no near relations except the applicant and her paternal grandmother, a lady over 60 years of age, living in Calcutta, and his uncles Sarut Chunder Singh and Indra Chunder Singh, who were alleged to be on bad terms with each other, and could not therefore properly act together as managers of the minor's property; and that the applicant was apprehensive that the award would shortly be confirmed by the Court, and that therefore the Receiver would be discharged, and the estate pass to the hands of the executors.

The application was opposed on the grounds

(1) that the Court had no jurisdiction inasmuch as the infant did not reside within the local limits of the Original side of the Court, and did not possess any property within such limits;

(2) that the suit for accounts of the estate of Grish Chunder Singh was still pending and the executors had not been discharged, and no application could, therefore, be entertained under the Guardian and Wards Act;

(3) that the grandmother of the infant and Sarut Chunder Singh, his paternal uncle, were willing to act as guardians, and had a preferential right to the applicant, and that testamentary guardians had already been appointed and had not been removed;

(4) that the applicant was not a fit and proper person to be appointed.

Mr. *Pugh*, Mr. *Garth* and Mr. *Chackravarti*, for the applicant.

Mr. *Jackson* (with him Mr. *Acworth*) for Sarut Chunder, referred to Simpson on the Law of Infants, 2nd Ed. 454-455; Trevelyan on Infants, p. 194; *In re McCullochs* (1), and *Ingham v. Bickerdike* (2).

Mr. *Sinha* for Indra Chunder Singh.

Mr. *O'Kinealy* for the Receiver.

SALE, J.—This is an application for the appointment of the adoptive mother of the infant Srish Chunder Singh as guardian of his person and property made under clause 17 of the Charter, and also under section 7 of the Guardians and Wards Act. The circumstances under which it is made may be shortly stated as follows:—Srish Chunder Singh was taken in adoption by the widow of Grish Chunder Singh, as a son to Grish Chunder Singh. Grish Chunder Singh, who was entitled to a share of very large properties, called the Paikpara Raj Estate, which originally belonged to two brothers, Issur Chunder Singh and Pertap Chunder Singh, died in 1877, leaving a will by which he appointed his uterine brothers Poorno Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and his paternal uncle's son Indra Chunder Singh, his executors. The terms of the appointment will be more particularly referred to presently.

At that time the family was joint, and the joint Paikpara estate was in charge of the Court of Wards and remained in charge of the Court of Wards till 1879. It was then, including the share of Grish Chunder Singh, made over to Poorna Chunder Singh, Indra Chunder Singh, and Sarut Chunder Singh, the share of Grish Chunder Singh being managed by them as his executors.

In 1889 a suit (No. 41 of 1889) was brought by Sarut Chunder Singh, one of the sons of Pertab Chunder Singh, for partition of the joint estate. In the same year, a suit No. 235 of 1889 was brought by Srish Chunder Singh, the adopted son of the petitioner, through the petitioner as his next friend, against the other members of the joint family, for the removal of Sarut Chunder Singh from acting further as executor to the estate of Grish Chunder Singh, and for an injunction and other relief. The case alleged against Sarut Chunder Singh was that

(1) 6 Ir. Eq., 393. (2) 6 Madd., 275.

1893

IN THE MATTER OF SRISH CHUNDER SINGH.

he had improperly dealt with large sums of money belonging to the estate. In 1891 a decree was made in the last mentioned suit, directing an account as against Sarut Chunder Singh and Indra Chunder Singh, as the surviving executors to the estate of Grish Chunder Singh.

On the 2nd February 1892 Sarut Chunder Singh filed his account. In the objections taken to this account it is alleged that the account is to a great extent unintelligible; that it is incomplete and insufficient; that it does not give credit for the whole income derived from Grish Chunder Singh's share in the joint estate, and that the disbursements charged in the account are not all properly chargeable against the share of Grish Chunder Singh. Indra Chunder Singh, though directed to file his account, has not done so.

It is an important fact that in the partition suit a Receiver was appointed of the whole Paikpara Raj estate. Thereupon the Receiver took charge and has ever since remained in charge of the estate.

The statements upon which the petitioner relies are, that by an award made by the arbitrator appointed in the partition suit to decide all matters in dispute between the parties, and to carry out the partition of the joint estate, the zemindaries belonging to the estate have been partitioned; that on the award being confirmed the receiver will be discharged as to such zemindaries; that the share allotted to Srish Chunder will then pass into the hands of the executors, who are unfit to take charge of it; that this should be prevented by the appointment of the petitioner as guardian.

It should, however, be stated that pending this application the award was remitted to the arbitrator for amendment and for reconsideration as to certain properties left unpartitioned. The result apprehended by the petitioner has thus been postponed.

The petitioner claims to be entitled to the order sought in the present application, both under the power which this Court has under its Charter, and also under the terms of the Guardians and Wards Act. The infant, it is admitted, resides outside the Original Civil jurisdiction of this Court, and the difficulty I have in proceeding under the jurisdiction given by the Charter is this:—

In the first place I am not aware of any instance in which this Court has exercised that jurisdiction in the case of an infant residing outside the ordinary Original Civil jurisdiction of this Court, who is other than a European British subject. And, further, it does not appear to be the practice of this Court, or of the English Courts, to act in a summary way without suit in the appointment of a guardian, except where no difficulty arises in the administration of an estate. Here there is an important question arising as to whether there are not now in existence persons in the position of testamentary guardians of the infant; at all events a claim is made on behalf of Sarut Chunder and Indra Chunder that they are in that position, and I do not think I should be justified in a summary proceeding, under the jurisdiction conferred by the charter, to appoint a guardian as against those persons. I may also say, having regard to the terms of the "Guardians and Wards Act," that even if the Court were now to act under the powers conferred by the Charter, still, in exercising those powers, it would not disregard, but as far as possible follow, the principles and procedure laid down in the Guardian and Wards Act. Coming to the terms of the Act, we find the definition of the word "Guardian" in the 4th section of the Act as follows:—"Guardian means a person having the care of the person of a minor, or of his property, or of both his person and property."

Now the question is whether, under the terms of the will appointing the executors and defining their powers, guardians of property within the meaning of the Act have in fact been appointed. By the second clause of the will the testator appoints his uterine brothers, Poorna Chunder Singh and Kanti Chunder Singh, executors, and directs that his youngest brother Sarut Chunder Singh, and his paternal uncle's son Indra Chunder Singh, who were then under age, should on attaining their majority also become executors.

Their powers in connection with the estate of the testator are thus defined in the 10th clause of the will: "If the party who is entitled to the property be under age, then the whole of my property will pass into the hands of my executors, and until the person so entitled as aforesaid shall attain the full age of 21 years, they shall manage all the property and the duties of the

1893

IN THE MATTER OF SRISH CHUNDER SINGH.

management and education of the said son shall be conducted under the supervision of my wife."

Now that, I take it, gives to the persons who are appointed executors the care and management of the property until the infant attains the full age of 21 years, and I therefore think this appointment did constitute the executors guardians within the meaning of the Guardians and Wards Act.

The 7th section of the Act provides that "where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly;" and the second clause of the section says that "an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument, or appointed or declared by the Court." This is controlled by sub-section 3. "Where a guardian has been appointed by will or other instrument, or appointed or declared by the Court, an order under this section, appointing or declaring another person to be guardian in his stead, shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

The present application is not one for the removal of Sarut Chunder Singh and Indra Chunder Singh: indeed, what has been contended is that these persons are not testamentary guardians of the infant. It may be that it is undesirable that the infant's estate should, under present circumstances, and until the charges made against Sarut Chunder Singh have been determined, revert to the care of Sarut Chunder Singh or Indra Chunder Singh, but that is a matter not before me at the present time, and the arguments addressed to me, though they might perhaps be of considerable weight in opposition to an application for the discharge of the Receiver, or in support of an application to continue the Receiver, so far as the estate of the infant is concerned, and so to prevent the property coming into the charge of either of the executors, do not assist the petitioner on the present application. I therefore think, having regard to section 7, that I am at present precluded from making any appointment of guardians of the property of the infant. As regards the application for the appointment

of a guardian of the person of the minor, the Act provides that the application should be made to the Court in whose jurisdiction the minor resides.

1893

IN THE MATTER OF SRISH CHUNDER SINGH.

Therefore, I think I have no power to make the order asked for. The application must be dismissed and the costs of Sarut Chunder Singh must be paid by the applicant. The Receiver, being in possession of the property, was right in appearing, and he will be at liberty to pay his own costs out of the estate, which will be debited to the share of the infant in the general estate. The Receiver will also be at liberty to pay the costs of Sarut Chunder Singh out of the infant's share in the general estate.

Application refused.

Attorneys for applicant: Messrs. *Remfry* and *Rose.*

Attorneys for *Indra Chunder Singh* : Messrs. *Morgan & Co.*

Attorney for *Sarut Chunder Singh:* Baboo *G. C. Chunder.*

Attorney for the Receiver: Baboo *Kally Nath Mitter.*

T. A. P.

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Macpherson, and Mr. Justice Ghose.

SURJAN RAOT (PLAINTIFF) *v.* BHIKARI RAOT AND OTHERS (DEFENDANTS).*

1893 *June* 16.

Arbitration—Private arbitration—Application to file private award—Objection to award, effect of—Power of Court—Civil Procedure Code, ss. 520, 521, 525, 526.

Held by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, MACPHERSON and GHOSE, JJ.) :—

Where an application is made to a Court for filing a private award, and objections are raised in a verified written statement, and the objections are such as fall within section 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but it is

* Full Bench reference in Rule No. 1470 of 1892, in the matter of suit 21 of 1892 in the Court of the Second Subordinate Judge of Shahabad.

1893

SURJAN RAOT v. BHIKARI RAOT.

the duty of the Court to inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not.

Per PRINSEP, PIGOT and MACPHERSON, JJ.—Where on such an application an objection is taken that the matters in dispute were never referred to arbitration, and is therefore not on the grounds mentioned in section 521, the Court has no jurisdiction to deal with it, but should reject the application and refer the parties to a regular suit.

THIS case was referred to a Full Bench by TOTTENHAM and GHOSE, JJ., on 13th February 1893, with the following remarks:—"This is a rule calling upon the opposite party Bhikari Raot and others to show cause why an order rejecting an application made by the petitioner before us to file a private award under section 525 of the Code of Civil Procedure should not be set aside.

"Upon the said application being made to the Subordinate Judge of Arrah, the opposite party were called upon to show cause, and they put in a verified petition setting forth their objections to the filing of the award; some of these objections being such as fall within section 521 of the Code. The Subordinate Judge, with reference to the question raised before him, whether, by reason of the objections made by the opposite party, the application was to be summarily rejected, or whether the objections should be inquired into, held, following a decision of this Court in *Hurronath Chowdhry* v. *Nistarini Chowdhrani* (1), that the opposite party having put in a verified petition containing objections falling within section 521 of the Code, must be taken to have shown cause, and that the application should be rejected, leaving the petitioner to bring a suit, if advised, for the enforcement of the award. The Subordinate Judge declined to determine the validity of the objections raised, upon the ground, as we understand it, that he had no authority to do so, and summarily rejected the application of the petitioner.

"In the case relied upon by the Subordinate Judge, two questions seem to have been discussed, first, whether an appeal lay against an order directing a private award to be filed, and secondly, what is the right course to adopt when an objection is made to the filing of an award upon grounds mentioned in sections 520 or

(1) I. L. R., 10 Calc., 74.

521 of the Code, and they held, with reference to the latter question, that the proper course was to dismiss the application and leave the parties to a regular suit.

"The question also arose in two other cases in this Court. In the case of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* (1) which came before Wilson and Macpherson JJ. Wilson J. held 'that the terms' of section 526 'are complied with, and grounds are shown, when it is shown by written statement or affidavit or other verified statement that the award is impugned as invalid for any of the reasons contained in sections 520 and 521 of the Code, and that the Court is then bound to hold its hands and leave the parties to their remedy by suit.' Macpherson, J., however, though he agreed in the conclusion arrived at in the case by Wilson J., did so for somewhat different reasons, and observed that he would 'hesitate to say that when such objections are set forth in a verified petition or affidavit, the Court is to make no inquiry.' In the case of *Dutto Singh* v. *Dosad Bahadur Singh* (2), Mitter and O'Kinealy JJ. disagreed from the view expressed by Wilson, J., in the case of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri*, and following a decision by the Bombay High Court in *Dandekar* v. *Dandekars* (3) remanded the case to the Lower Court for determination of the objections taken by the opposite party in that case to the filing of the award according to law. In another case, *Rung Lall* v. *Hem Narain Gir* (4), Mitter and Norris JJ. adopted the construction which was put upon the words 'to show cause' by the Bombay High Court in the case already referred to; and we find that the Allahabad High Court in *Jones* v. *Ledgard* (5) has dissented from the view expressed in the case of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* by Wilson J., and by Pontifex J. in another case which is also to the same effect—*Sreeram Chowdhry* v. *Denobundhoo Chowdhry* (6). In the case of *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (7), there are also expressions of opinion by some of the Judges who constituted the Full Bench which are in conflict with one

(1) I. L. R., 9 Calc., 557.
(2) I. L. R., 9 Calc., 575.
(3) I. L. R., 6 Bom., 663.
(4) I. L. R., 11 Calc., 166.
(5) I. L. R., 8 All., 340.
(6) I. L. R., 7 Calc., 490.
(7) 8 B. L. R., 315.

1893

SUBJAN RAOT v. BHIKARI RAOT.

or other of the cases we have referred to, and we are not agreed as to which of the views expressed in the cases referred to above is correct. We think it therefore very desirable that the point should be authoritatively decided by a Full Bench.

"The question that is referred is:—'When an application is made to a Court for filing a private award, and objections to the validity of the award are raised in a verified written statement, and the objections are such as fall within section 521 of the Code of Civil Procedure, is the Court bound to hold its hands and reject the application, or is it the duty of the Court to inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not.'"

Babu *Karuna Sindhu Mookerjee* (for Babu *Jogendro Chunder Ghose*) for the appellant.

Babu *Akshoy Kumar Banerjee* for the respondent.

Babu *Karuna Sindhu Mookerjee*:—The rule in this case was obtained under section 622 of the Civil Procedure Code. The question for decision is, what is the proper construction of section 525 of the Civil Procedure Code. Does the term "to show cause" mean simply to allege cause, or to allege cause and prove it to the satisfaction of the Court. I contend that the words should bear the latter construction. The term "to show cause" is a technical term having a well-understood meaning; it occurs in sections 258, 479, and 485 of the Ciivl Procedure Code. In all these sections the words evidently mean, to allege cause and prove it to the satisfaction of the Court. See *Rung Lall* v. *Hem Narain Gir* (1). Section 525 provides that the application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. This clearly shows that the Court must proceed regularly and make inquiries as to the truth or falsity of the objections to the award: simply putting in objections is not enough. The sections 525 and 526 must otherwise be limited to those cases only where both the parties agree to the filing of the award; this was evidently not the intention of the Legislature. In the case of *Dandekar* v. *Dandekars* (2), Melvill J. has fully gone into the question,

(1) I. L. R., 11 Calc., 166. (2) I. L. R., 6 Bom., 663.

and is of opinion that the term "to show cause" means to allege cause and prove it to the satisfaction of the Court. This case was followed by Mitter and O'Kinealy JJ., in *Dutto Singh* v. *Dosad Bahadur Singh* (1). The Allahabad and Madras High Courts have taken the same view in *Jones* v. *Ledgard* (2) and *Micharaya Guruvu* v. *Sadasiva Parama Guruvu* (3). In the case of *Jones* v. *Ledgard*, Straight J., has gone into the question fully and has clearly pointed out that the opinions of Pontifex J., in *Sreeram Chowdhry* v. *Denobundhoo Chowdhry* (4), and Wilson J., in *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry* (5) cannot be correct. Those cases and the case of *Hurronath Chowdhry* v. *Nistarini Chowdhrani* (6) are against me. In *Ichamoyee Chowdhranee* v *Prosunno Nath Chowdhri* (5), Macpherson J., who sat with Wilson J., observed as follows:—"But I hesitate to say that, when such grounds of objection are set forth in a verified petition or affidavit, the Court is to make no inquiry, or if it does decide as evidence that no grounds exist, the decision is one with which we could interfere under section 622 of the Code." Sections 525 and 526 took the place of s. 327 of the old Code, Act VIII of 1859: that section has been construed by the Privy Council in *Chowdhry Murtaza Hossein* v. *Bechunnissa* (7). The only difference in the two Codes, so far as the present question is concerned, is, that in the old Code the term "sufficient cause" occurs. In the Code of 1882 the words of s. 526 are, "if no ground such as is mentioned or referred to in s. 520 or s. 521 be shown against the award." This difference is not material, the meaning is the same. The Privy Council say what "sufficient cause" means; they do not put the narrow constructions which Pontifex and Wilson JJ. put on ss. 525 and 526 of the Code. In the Full Bench case of *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (8), no doubt two of the learned Judges (Loch and Paul JJ.) have expressed an opinion on the matter, but the other learned Judges do not say anything on it. There the only question was whether an appeal lay against a decree

(1) I. L. R., 9 Calc., 575.
(2) I. L. R., 8 All. 340.
(3) I. L. R., 4 Mad., 319.
(4) I. L. R., 7 Calc., 490.
(5) I. L. R., 9 Calc., 557,
(6) I. L. R., 10 Calc., 74.
(7) L. R., 3 I. A. 209 (213).
(8) 8 B. L. R., 315.

1893

SURJAN RAOT v. BHIKARI RAOT.

made on a private award. I therefore submit that the term "to show cause" does not mean simply to allege cause, but to allege cause and to prove it to the satisfaction of the Court.

Babu *Akshoy Kumar Banerjee* for the respondent:—Any objection to the filing of the award is sufficient reason for the Court to refuse to enforce it, and the parties to it desiring to do so must, to enforce it, bring a suit on it in the regular way. The words "sufficient cause shown," which occur in s. 327 of the Code of 1859, are not to be found in the present Code: an allegation against the enforcement of the award is sufficient under the present Code. The Full Bench case of *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* supports my contention, as it shows that no appeal lies. The remedy is by a regular suit—*Hurronath Chowdhry* v. *Nistarini Chowdhrani* (1), *Bindessuri Pershad Singh* v. *Jankee Pershad Singh* (2). There is no appeal from an order of refusal to accept the award, or rather refusal to allow it to be filed—*Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (3), *Bhola* v. *Gobind Dayal* (4), *Byadhur Bhugut* v. *Monohur Bhugut* (5), *Vyankatesh Ramchundra Jogekar* v. *Bolajerav.* (6). The proceedings under ss. 525 and 526 of the Code refer only to cases where both the parties to the award agree to its being filed; where there is an objection they should be referred to a suit. No appeal is given under s. 588 of the Code against orders under s. 526, whereas under that section appeals lie from orders under ss. 479 and 485, which were referred to as showing the meaning of the term "show cause."

Babu *Karuna Sindhu Mookerjee* in reply:—The distinction pointed out between s. 327 of Act VIII of 1859 and s. 526 of Act XIV of 1882 is not well founded: the meaning is the same. The Privy Council case of *Chowdhry Murtaza Hossein* v. *Bechunnissa* (7) was a decision on s. 327 of Act VIII of 1859; there objections were taken as they have been taken here, but the Court did not withhold its hand, and the Privy Council did not take a different view of the term "show cause." As

(1) I. L. R., 10 Calc., 74.
(2) I. L. R, 16 Calc., 482.
(3) I. L. R., 7 Calc., 420.
(4) I L. R, 6 All., 186.
(5) I. L. R, 10 Calc., 11.
(6) 1 Bom., 184.
(7) L. R., 3 I. A., 209; 26 W. R., 10.

regards the argument that the orders under ss. 479 and 485 are appealable, while the order under s. 526 is not appealable, I submit there is no good ground why a different construction should be put upon the term "show cause" occurring in different parts of the Code.

The following opinions were delivered by the Full Bench :—

PETHERAM C. J.—My answer to the question referred to the Full Bench is that, when an application is made to a Court for filing a private award, and objections to the validity of the award are raised in a verified written statement, and the objections are such as fall within section 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but must inquire into the validity of the objections raised, and thereupon determine whether the award shall be filed or not.

Before examining the cases on the subject, it will be well to see what are the provisions of the Code, by which the rights and liabilities, whatever they may be, are created.

Sections 506 to 522 create a system of procedure by which the matters in issue *in a suit* may, if the parties wish it, be tried by arbitration, and by which the judgment and decree in the suit must be in accordance with the award, unless it has been set aside in consequence of the misconduct of the arbitrators, the fraud of either of the parties, or because it was made after the submission had been superseded, the only ground of appeal from such a judgment being that the decree is in excess of, or not in accordance with, the award.

Sections 525 and 526 create a procedure by which, when no action is pending, matters in dispute may be referred to arbitration, and a mode by which, in my opinion, the award, when made, is to be enforced.

Section 525 provides that, when an award has been made under a submission by agreement, any person interested in it may make a written application to a Court to file it, which application is to be numbered and registered as a suit, and notice of it requiring them to show cause is to be given to all the other parties to the

1893

SURJAN RAOT v. BHIKARI RAOT.

arbitration, any of whom may show cause on any or either of the following grounds:—

A—(*a*) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration.

(*b*) Where the award is so indefinite as to be incapable of execution.

(*c*) Where an objection to the legality of the award is apparent upon the face of it.

B—(*a*) Corruption or misconduct of the arbitrator or umpire.

(*b*) Either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire.

(*c*) The award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit.

If no such cause is shown against the award, it is to be filed and shall then take effect as an award under the provisions of Chapter XXXVII of the Code, that is to say, it takes effect as an award upon which judgment must be given, and upon which judgment a decree must follow in the suit which was, I think, for reasons which I will presently mention, commenced by the petition to file the award, which petition, by virtue of section 525, takes the position of the plaint by which a suit is to be commenced.

The question upon which there are conflicting decisions in this Court is whether the provision in section 526, that the award is to be filed unless cause is shown, means that it is to be filed unless some legal cause is proved to exist, why it should not be filed, or whether it means that it is not to be filed if it is merely asserted, by a verified statement or affidavit made by some person interested, that some such cause exists.

I now proceed to examine the cases to which we have been referred. They are: *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1). Pontifex and Field JJ. there held that no appeal lay from an order of a Subordinate Judge refusing to file an award

(1) I. L. R., 7 Calc., 490.

under section 525. Both the learned Judges expressed the opinion that the words "The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants" in section 525 did not have the effect of converting the application into a suit for all purposes, but merely meant that for the purposes of the entry in the register of civil suits, and of the classification of the business of the Courts, *and for these purposes only*, the application is to be regarded as a suit; and Pontifex J., in the course of his judgment said, "I think it would be the duty of the Court without inquiring into the validity of the cause so shown to refuse the application to file the award, and to leave the applicant to his remedy by suit." If this view is correct, and if section 525 does not have the effect of converting the application into a suit, then it seems to me that, if an objection is made by any one, the award ought not to be filed; but the decision of the question on which the opinion is expressed was not necessary for the decision of the case, and I am unable to agree in that opinion. If the application to file the award is not converted into a suit for all purposes, it is not converted into one at all, for any but an administrative one, as defined by Field J., and it must follow that the award cannot be enforced under the provisions of those sections, as there is no suit pending in which a decree can be made, and filing the award has no effect whatever, as even after it is filed, it can only be enforced by a regular suit, to be commenced by a plaint in the ordinary way, which could be done as well before it is filed as it could afterwards; and this is to hold that these two sections, 525 and 526, have no practical effect whatever. I understand that from the passing of the Act down to the present time, proceedings under these sections have been treated as suits, in this way, that when the award has been filed, judgment and decree have in all cases followed upon such filing without any question, and I think it would be impossible to hold now that all such decrees have been waste paper because they were not made in any suit.

The next case is that of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry* (1), where Wilson J. held that, when it is shown, by written statement or affidavit or other verified statement, that the

(1) I. L. R., 9 Calc., 557.

1898

SUHJAN RAOT v. BHIKARI RAOT.

award is impugned as invalid, for any of the reasons contained in sections 520 and 521, the Court is then bound to hold its hand and leave the parties to their remedy by suit. Macpherson J. agreed in setting aside the order in that case, but added that he would hesitate to say that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no enquiry.

In *Dutto Singh* v. *Dosad Bahadur Singh* (1), Mitter and O'Kinealy JJ. dissented from the opinion of Wilson and Macpherson JJ., and adopted that of Melvill and Pinhey JJ., of the Bombay High Court, in the case of *Dandekar* v. *Dandekars* (2), who had held that the term "to show cause" is a technical term having a well-understood meaning; that it does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and prove it to the satisfaction of the Court. In *Hurronath Chowdhry* v. *Nistarini Chowdhrani* (3), (Garth C. J., and Macpherson J)., the Chief Justice in the course of the judgment said: "We are disposed to think that when an application is made to the Court to file an award, and an objection is made to the filing of it upon any of the grounds mentioned in sections 520 or 521, the proper course for the Court to pursue is to dismiss the application and to leave the applicant to bring a regular suit to enforce the award, in which all the objections to its validity may be properly tried and decided." *Jones* v. *Ledgard* (4); Straight J., after considering all the authorities said: "What I consider is required is that such party should by argument, or evidence, or both, show substantial materials to warrant the Court in arriving at a conclusion that the reasons referred to in section 520 and section 521 exist in the particular case." *Bindessuri Pershad Singh* v. *Jankee Pershad Singh* (5); the question is referred to in the judgment of Mitter and Beverley JJ., but is not decided.

In the cases in this Court, in which it has been held that, when an objection is taken, the Court should refuse to file the award, the reason which induced the Judges to take that view seems to have

(1) I. L. R., 9 Calc., 575.
(2) I. L. R., 6 Bom., 603.
(3) I. L. R., 10 Calc., 74.
(4) I. L. R., 8 All., 340.
(5) I. L. R., 16 Calc., 482.

been that in an action to enforce the award, all the objections to its validity could be more conveniently considered than in a proceeding to file it, but except in the case of *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1), the Judges do not appear to have expressly considered the effect of the provision in section 525, that the petition is to be registered as a suit, and that everything which could be pleaded as an answer to an action to enforce the award could be pleaded as an answer to the petition to file the award; so that, as far as I can see, the proceeding to enforce the award by petition is identical with a proceeding to enforce it by suit, except that in a proceeding by petition no appeal lies against the judgment, except on one of the grounds mentioned in section 522, whilst in an action an appeal would lie against the judgment on those mentioned in sections 520 and 521 as well. When it is borne in mind that the proceeding to file the award is a mode of enforcing it, I think that the words "show cause" must have the meaning which was attributed to them by Melvill J. in the case which I have already quoted, as the cause to be shown is cause to be shown against a proceeding which is by the law converted into a suit, and I do not think it could be the intention of the Legislature that such a proceeding could be defeated by a mere assertion, the truth or sufficiency of which was not admitted, and which had not been established.

For these reasons my answer to the first part of the question referred to us is in the negative, to the latter part in the affirmative. The result is that the rule will be made absolute. We make no order as to costs.

PRINSEP J.—The question raised in this matter is whether, in an award made without the intervention of a Court, and presented to a competent Civil Court to be filed, if one of the parties to the arbitration, on being called upon under section 526 to show cause, takes an objection falling within section 521 of the Code of Civil Procedure, 1882, the Court is bound to decide on such objection or should stay its hand and refer the parties to a suit.

Section 525 directs that such an application should be numbered and registered as a suit between the parties to the arbitration, and

(1) I. L. R., 7 Calc., 490.

1893

SURJAN RAOT v. BHIKARI RAOT.

it further directs that notice should be given to such parties, other than the applicant, to show cause why the award should not be filed. Section 526 declares that if no ground, such as is mentioned or referred to in section 520 or section 521, is shown against the award, the Court shall order it to be filed, and such an award shall then take effect as an award under the provisions of Chapter XXXVII of the Code, that is, it shall take effect as a decree. It has been contended, under the authority of some cases of this Court, that if such an objection be raised, the Court should stay its hand, and refer the parties to a suit. By this I understand that it should dismiss the application which is declared by the law to be numbered and registered as a suit. These, however, are points which must necessarily arise on such an application, and form the subject-matter of issues to be decided, unless it is contemplated that the matter should become a decree only by consent of the parties. I do not agree in the view of the law which would place it in the hands of any party to an arbitration to defeat the object of the arbitration and the law by merely making an objection falling within section 520 or section 521, however groundless or dishonest that objection may be if subjected to investigation. As remarked in *Dandekar* v. *Dandekars* (1), "It would be unreasonable to suppose that the Legislature intended that a mere allegation of the existence of cause without any inquiry whatever into the validity of the cause alleged would be sufficient to prevent the filing of an award." Their Lordships of the Privy Council in *Chowdhry Murtaza Hossein* v. *Bechunnissa* (2) considered objections of this nature in a case under the Code of 1859, which, however, was not dissimilar to the present case. The objection taken in this case was not taken before their Lordships, but we cannot hold that it was not present to their minds. It was held that any ground which would be fatal to an award on an application to the Courts of England could in India be taken under the Code of 1859, and the objections taken were duly considered in deciding that case. It seems to me that the slight alteration of the law made by section 526 of the Code of Civil Procedure, 1882, was, as was held by Straight J., in

(1) I. L. R., 6 Bom., 663.

(2) L. R., 3 I. A., 209; 26 W. R., 10.

Jones v. *Ledgard* (1), especially designed to give full effect to that judgment. I observe that the case in the Privy Council was not cited in any of the cases on this subject, except in that of the Allahabad Court.

So far, therefore, I think that on cause shown on any of the grounds mentioned in section 520 or section 521, the Court is bound to determine the objections raised. But we have been also required to consider what course should be followed if the objection is taken that the matters in dispute were never submitted to arbitration, whether it is open to the Court to consider such an objection, or whether it should rather refer the parties to a regular suit. It is unfortunate that the Code should be obscure on such a point. But the fact that it refers only to objections taken on the grounds mentioned in section 520 or section 521, seems to me to show that it proceeds on the assumption that a submission to arbitration has been made so as to enable the Court to deal with it under sections 525 and 526. It requires the Court to deal with objections only to the conduct of the arbitrators, the conduct of the parties while the matter was under arbitration, and the award itself; and it therefore seems to contemplate that in a proceeding of this description the Court should confine itself to these matters; an objection that there was no submission to arbitration seems to deprive the Court of jurisdiction to proceed under sections 525 and 526, and to require that the matters in dispute should be adjudicated in a suit.

PIGOT J.—The question referred in this case is no doubt limited to one point which arises under section 526 of the Code; namely, whether, when an application is made to file a private award, and objections are raised to the filing of the award, which objections are such as fall within section 521 of the Code, the Court is bound to hold its hand and reject the application, the rulings to that effect—*Hurronath Chowdhry* v. *Nistarini Chowdhrani* (2), *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* (3), and *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (4)—being thus in this question referred to the Full Bench.

(1) I. L. R., 8 All., 340.
(2) I. L. R., 10 Calc. 74.
(3) I. L. R., 9 Calc., 557.
(4) I. L R., 7 Calc., 490.

1893

SUBJAN RAOT v. BHIKARI RAOT.

Although, according to the terms of the rules regulating references to a Full Bench, this question alone can be authoritatively answered, I think it would be unsatisfactory (as it might lead to misapprehension) to abstain in answering this question from all reference to the wider question how far, in the case of proceedings under sections 525, 526, the Court ought to stay its hand upon objection made to the filing of the award. The decisions above mentioned are founded chiefly on the ground that proceedings under these sections, as they have the character given to proceedings under the earlier sections of Chapter XXXVII, of absolute finality without appeal, cannot have been intended to involve the final determination of questions of such difficulty as may arise under sections 525, 526. That I understand to have been the principal, though not the only, reason of those decisions. Having regard to the decisions which have been cited, and to the general scope of the sections of this chapter, I agree in the opinion that, so far as relates to questions of the kind which fall within section 531, the Court, under sections 525, 526, was intended to deal with them, and to do so finally, and that the argument founded upon the denial of any right of appeal has been carried too far when invoked as a reason why the Court should not, under sections 525, 526, deal with questions arising under section 521. But I think it would be unsatisfactory in saying this to leave without any notice the question how far the argument founded on the denial of appeal is applicable to proceedings under sections 525, 526; since, if this were done, it might possibly be supposed that all questions of every kind relating to a private award are, in our opinion, such as must be dealt with under these sections; and this, I think, ought to be guarded against.

The circumstances under which the provisions of section 526 become applicable, are stated in section 525. They are—

First.—That a matter has been referred to arbitration without the intervention of a Court of Justice.

Second.—That an award has been made.

Third.—That an application has been made that the award be filed in Court.

Fourth.—That notice to show cause has thereupon been given to the parties to the application other than the applicant.

These conditions having been fulfilled, the case stands upon the same footing as one in which, under the earlier sections, the fact of the submission and of the making of the award being beyond question, the only matters of dispute that can arise are those contemplated by sections 520 and 521.

Under such circumstances, the Court is in nearly the same position, in respect of its power to do justice between the parties, as though the arbitration had been had upon a reference made by order of Court under section 508, or upon an agreement to refer filed in Court and an order thereon under section 523.

There are, no doubt, differences between the provisions relating to an arbitration held under an order of Court, and those on a private reference, and notably that section 513 does not apply to the latter class of cases. But I think that upon the true construction of section 526, it must be held that the Legislature intended to give to awards made in private arbitration the same degree of finality as is given to awards made in pursuance of an order of reference, provided, first, there be no question of the fact of the reference having been really made, second, and none that an award has been made under it.

These two last conditions seem to me to be essential preliminaries necessary before section 526 can apply. I do not see that the sections 525, 526, provide for cases in which the *factum* of the reference or of the award under it is challenged, and in the absence of express provision to that effect in the Code, I do not think it can be held that these questions can be determined by the Court acting under these sections.

I do not think that the fact that an application to file an award alleged to have been made upon an alleged reference is to be filed and numbered as a suit, does, by implication making the proceeding a suit for all purposes, give the Court power to determine, without appeal, whether the alleged reference has been actually made, and the alleged award has been actually made under it.

I think that as to both these matters, and those which may arise in reference to them, the reasoning of the Bombay High Court in the case of *Samal Nathu* v. *Jai Shankar Dalsukram* (1) may be applied: and that if either the reference or the award is

(1) I. L. R., 9 Bom., 254.

1893

SURJAN RAOT v. BHIKABI RAOT.

challenged, the parties must be left to a regular suit, which I think will certainly well lie on the award, if actually and duly made; *Palaniappa Chetti* v. *Rayappa Chetti* (1) and *Kota Seetamma* v. *Kollipurla Soobbiah* (2).

I think that, if no question arises as to the fact of the reference, or as to the fact of the award, and the questions raised are only those which fall within section 521 of the Code, it is the duty of the Court to inquire into and determine the validity of such objections. But I think that, if either the fact of the alleged reference, or the fact of the alleged award, or both, be denied, then the Court has not, under sections 525, 526, the power of deciding upon the dispute between the parties: it should reject the application to file the award and leave the applicant to his remedy by suit.

The question referred to us must, I think, be answered as to the first part of it in the negative, and as to the second part of it in the affirmative.

MACPHERSON J.—I agree with Mr. Justice Pigot, and would only add a few words. The direction that the application "shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants" does not, I think, in itself indicate that the application is to be treated as a suit in which all the questions which might arise on the application are to be tried and determined. Sections 331 and 529 of the Code contain a similar direction, but there is a further provision that the cases referred to in each of those sections should be tried as if a suit had been instituted. From the absence of any such provision in connection with sections 525 and 526, and from the specification of the particular grounds on which cause may be shown, and which are obviously not exhaustive, it may be inferred that the power of the Court in dealing with the application is limited, and limited to the grounds referred to in section 526. In this view an objection that there was no submission, or that the award was not the award of arbitrators, would, I think, be fatal to the application, and the Court would have no power to inquire into it. But if the objection taken is such as is referred to in section

(1) 4 Mad. H. C., 119. (2) 8 Mad. H. C., 81.

520 or 521, it seems to be intended that it should be inquired into and determined in the same way as if it had been taken to an award made under a reference by the Court and filed under section 216. Otherwise there is no apparent reason for limiting the grounds on which cause may be shown to the grounds specified in section 526.

GHOSE J.—I agree with the Chief Justice in the answers he proposes to give to the questions referred to the Full Bench.

As to what may be the true import of the expression "if no ground such as is mentioned or referred to in section 520 or 521 be shown against the award," as occurring in section 526 of the Code, there is considerable divergence of opinion, as set out in the order of reference.

Section 526 of the Code provides that when any person interested in a private award is desirous of enforcing it, he may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court. The application when presented shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants; and the Court shall then call upon the opposite party to show cause why the award should not be filed. Section 526 provides that if no ground such as is mentioned in section 520 or 521 be shown against the award, the Court shall order it to be filed; and such award shall then take effect as an award made under the provisions of the Chapter XXXVII, *i.e.*, an award made through the intervention of the Court. On turning to section 522, which relates to such an award, we find it laid down that if the award is accepted, judgment shall be given in accordance therewith, and upon the judgment so given a decree shall follow.

When therefore section 526 provides that the award shall take effect as a decree, I take it that judgment shall be passed by the Court, and a decree shall follow as in section 522. When such a decree is made, the same limitation as to appeal, as applies to decrees made upon awards through the intervention of Court, equally applies to it. In this view of the matter the proceedings taken upon the application, which is registered as a suit, may rightly be regarded as proceedings taken in the suit. When,

1893

SURJAN RAOT v. BHIKARI RAOT.

however, the Court refuses to file the award, such order of refusal is not a decree, and is not open to appeal. In this event, it may well be doubted whether the proceedings could be regarded as proceedings in a suit, properly so called.

But however that may be, the Legislature, by providing that the application shall be registered as a suit between the applicant as plaintiff and the other parties as defendants, and that the award, when ordered to be filed, shall take effect as a decree, has, I think, clearly indicated that the proceedings taken upon the application should take the form of a suit, and should be of the same character as in a suit properly so called; and the question thereupon arises, what is the duty of the Court when the defendants appear and allege certain grounds against the award: whether it should inquire into and determine the validity of the grounds, or whether it should at once put an end to the proceedings by declining to proceed any further with the matter. In the case of *Sashti Charan Chatterjee* v. *Turak Chandra Chatterjee* (1) decided by a Full Bench of this Court, Norman Chief Justice, with reference to private awards, observed as follows: "I am disposed to think that an award filed under the provisions of section 327 stands in precisely the same position as an award submitted to the Court under section 320. In both cases before passing final judgment the Court is empowed by section 322 to modify or correct the award; by section 323 to remit the award for reconsideration, first, if the award has left undetermined some of the matters referred to arbitration or determined matters not referred to arbitration; secondly, if it is so indefinite as to be incapable of execution; thirdly, if an objection to the legality of the award is apparent on the face of the award; and lastly, by section 324 the Court is empowered to set the award aside in certain cases."

Whether these observations could be altogether supported is open to doubt, having regard especially to the decision of the Privy Council in the subsequent case of *Chowdhry Murtaza Hossein* v. *Bechunnissa* (2) to be hereafter referred to. But that is the view which was expressed in the case of *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1).

(1) 8 B. L. R., 315.

(2) L. R., 3 I. A., 209, 26 W. R., 10.

When an objection is raised to the legality of an award made through the intervention of the Court, the Court, I take it, is bound to investigate into the truth or otherwise of the objection under sections 520 and 521 of the Code,—and the question is whether the same rule ought not to apply in the case of a private award, when a like objection is raised before the Court.

If the question had arisen with reference to the old Procedure Code (Act VIII of 1859), I apprehend that there would be no difficulty upon the authorities in answering the question. In section 327 of the old Code, the words were "if no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the provision of this chapter." The observations of Norman Chief Justice, in the Full Bench case of *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1) already referred to, and the judgment of the Privy Council in the case of *Chowdhry Murtaza Hossein* v. *Bechunnissa* (2) are, I think, conclusive to show that under the old Procedure Code, the Court would be bound to investigate the question raised by the petition of the defendant, and thereupon to determine whether the award should be filed or not. In the case of *Chowdhry Murtaza Hossein* v. *Bechunnissa*, which was a case of a private award, the Judicial Committee, although they were of opinion that the earlier sections of Chapter VI of the old Code, relating to awards made through the intervention of the Court, were not incorporated into section 327, still, in construing the words "sufficient cause" as occurring in the said section 327, held that those words "should be taken to comprehend any substantial objection which appears upon the face of the award, or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country;" and the Judicial Committee, treating the proceedings as if they were in a suit, examined fully into the objections raised by the defendant.

It seems to be probable that the Legislature, having in view the observations of the Judicial Committee in the case of *Chowdhry Murtaza Hossein* v. *Bechunnissa*, expressly incorporated (as I

(1) 8 B. L. R., 315.

(2) L. R., 3 I. A., 209; 26 W. R., 10.

1893

SURJAN RAOT v. BHIKARI RAOT.

understand it did incorporate) the earlier sections 520 and 521 of the present Code into section 526, and when this section says "if no ground such as is mentioned in section 520 or 521 be shown against the award," I think that the Legislature meant to lay down that if no such ground is established, the Court shall order the award to be filed. I cannot lead myself to believe that the Legislature, while they incorporated sections 520 and 521 into 526, and while they provided that the application is to be registered as a suit between the applicant as plaintiff and the opposite party as defendant, meant to alter the whole scope of section 327 of the old Code and to limit the functions of the Court under sections 525 and 526 of the present Code in such a way that the Court should have no authority to inquire into and determine the validity of the objections raised by the defendant.

I agree in the view expressed by the Bombay High Court in the case of *Dandekar* v. *Dandekars* (1). Melvill J., in the course of his judgment in that case observed:—"Moreover, it would be unreasonable to suppose that the Legislature intended that the mere allegation of the existence of cause without any inquiry whatever into the validity of the cause alleged should be sufficient to prevent the filing of an award. This would be to render the filing of the award impossible in almost any case;" and later on "The term 'to show cause' is a technical term having a well-understood meaning. It does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. We think we may safely say that the term is used in this sense in every other part of the Code in which it occurs (*e.g.*, in sections 479 and 485), and we do not see how we should be justified in putting a different construction upon it in sections 525 and 526." I entirely agree in these observations. This case was followed in this Court in two cases in *Dutto Singh* v. *Dosad Bahadur Singh* (2) and *Rung Lall* v. *Hem Narain Gir* (3) and in the Allahabad Court in *Jones* v. *Ledgard* (4).

It has been said that a suit upon the award is the right form of action, in which objections as to the validity of the award may

(1) I. L. R., 6 Bom., 663.
(2) I. L. R., 9 Calc., 575.
(3) I. L. R., 11 Calc., 166.
(4) I. L. R., 8 All., 340.

properly and effectually be gone into, and that when any objection is raised under section 526, the Court should refer the parties to a regular suit. I doubt, in the first place, whether a separate suit would lie to enforce an award if the application to file it can be dealt with under section 526, and if it has been refused, though no doubt a suit being brought upon the original right the award may be referred to as evidence in support of that right. But however that may be (and it is perhaps unnecessary to express any opinion upon that question in this case), I do not see why, if the Legislature has provided a procedure under sections 525 and 526 to enforce an award, the parties should be driven to another suit.

Whether, if an objection is raised upon the score that there was no submission to arbitration, or that there was no award at all, the Court would have jurisdiction to deal with the matter, is a question which does not arise in this reference, and I therefore refrain from expressing any opinion upon it. I confine myself to the question as referred.

J. V. W.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice O'Kinealy, Mr. Justice Norris, and Mr. Justice Ghose.

1894 *Feb.* 1.

GOURHARI KAIBURTO (DEFENDANT) *v.* BHOLA KAIBURTO AND ANOTHER (PLAINTIFF).*

Regulation XI of 1825, *s.* 4 (*cl.* 1)—*Accretion—Occupancy right—Jote tenure—Ryot.*

A ryot who has a right of occupancy is entitled to the benefit of section 4, (clause 1) of Regulation XI of 1825.

Gobind Monee Debia v. *Dinobundhoo Shaha* (1), *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3) followed.

Finlay, Muir and Company v. *Gopee Kristo Gossamee* (4) not followed.

THE plaintiff in this case sought to obtain possession of 15 *gundas* of land on the ground that it was an accretion to his

* Full Bench Reference in appeal from Appellate Decree No. 1533 of 1892, against the decree of Babu Dwarka Nath Mitter, 1st Subordinate Judge of Tipperah, dated the 23rd May 1892, reversing the decree of Babu Jagan Mohun Sarkar, Munsif of Nabinuggur, dated the 16th July 1890.

(1) 15 W. R., 87.
(2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.
(4) 24 W. R., 404.

1894

GOURHARI KAIBURTO v. BHOLA KAIBURTO.

ryoti jote, which *jote* he had held for more than 12 years. The defendant claimed to be in possession by virtue of a settlement from the zemindar. It was admitted that the plaintiff had never been in actual possession of the accretion. The Munsif held that the plaintiff had no right by contiguous accretion and dismissed the suit; holding that the suit was not barred by article iii, schedule 3 of the Bengal Tenancy Act, as he had never been in possession of the accreted lands. The Subordinate Judge on appeal reversed the Munsif's decision and declared the plaintiff to be entitled to the accretion, on the ground that under section 4, clause 1 of Regulation XI of 1825, he had the same right in the accreted land as he had in his *jote* tenure.

The defendant appealed to the High Court, and on the case coming up for hearing before O'KINEALY and RAMPINI, JJ., the learned Judges referred to a Full Bench the question, whether a ryot who has a right of occupancy is entitled to the benefit of section 4, clause 1 of Regulation XI of 1825?

The following was the referring order:—

"This reference arises out of two analogous cases tried by the Subordinate Judge of Tipperah. In both these cases the Judge in the Court below held that the plaintiff had been in possession of his *jote* for more than 12 years, and therefore acquired an occupancy in it. It was admitted before him that the land in dispute had recently accreted to the plaintiff's *jote*. The Judge held that the plaintiff *jotedar* had, under section 4, clause 1 of Regulation XI of 1825, the same right in the accreted land which he had in the *jote* tenure.

"The decisions of the Court have not been uniform on this point. In the case of *Zuheerooddeen Paikar* v. *Campbell* (1) it was held that this provision of the Regulation referred only to an under-tenant, intermediate between the zemindar and the ryot, and to *khoodkast* or other ryots, who should by the terms of the engagement possess some permanent interest in the land. In the case of *Finlay, Muir and Company* v. *Gopee Kristo Gossamee* (2) it was broadly laid down that there is no right of accretion by which a ryot is entitled to claim under the law of the country. On the

(1) 4 W. R., 57. (2) 24 W. R., 404.

other hand, we find in the cases of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1), *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3) that a ryot has been held to be entitled to the benefit of section 4, clause 1 of Regulation XI of 1825.

"As we are unable to reconcile these decisions and have some doubt as to the correctness of the view taken in the first set of cases, we refer the case to a Full Bench."

Babu *Jogendro Nath Bose* for the appellant:—The case of *Zuheerooddeen* v. *Campbell* (4) is not applicable, as there the claimant was a tenant from year to year only.

The case of *Finlay, Muir and Company* v. *Gopee Kristo Gossamee* (5) broadly states that a ryot is not entitled to the advantage of the law, and the word "law" must be taken to mean this Regulation. I rely on this case. [PRINSEP J.:—The word *asli* in that case is a misprint for *aruli*.] In the case of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1) the question whether there was an accretion was not decided; in *Attimoollah* v. *Saheboollah* (2) there was not only a right of occupancy in the *jotedar*, but the *jote* was his hereditary *jote*. In *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3) the plaintiff was more than a tenant-at-will, as will be seen from the findings of the District Judge. So far as it deals with a tenant-at-will, it is *obiter*. The case of *Oodit Rai* v. *Ram Gobind Singh* (6) is in my favour. The facts in *Narain Doss Bepary* v. *Soobul Bepary* (7) are not given.

Babu *Madhubanund Bysak* for the respondents was not called upon.

The opinion of the Court (PETHERAM, C.J., PRINSEP, O'KINEALY, NORRIS, and GHOSE, JJ.) was delivered by

PETHERAM, C.J.—The terms of Regulation XI of 1825, section 4 (clause 1), are in our opinion clear; the plaintiff who has an occupancy right in a *jote* is entitled to hold the lands in dispute as an increment to that *jote*. We therefore agree in the view of the law

(1) 15 W. R., 87.
(2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.
(4) 4 W. R., 57.
(5) 24 W. R., 401.
(6) 2 Agra. H. C., 206 (Dec. 1867).
(7) 1 W. R., 113.

1894

GOURHARI KAIBURTO v. BHOLA KAIBURTO.

expressed in the cases of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1); *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3). The appeal is dismissed with costs.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *June* 1.

NIL MADHUB SARKAR (DEFENDANT) *v.* BROJO NATH SINGHA (PLAINTIFF).*

Res judicata—Rent suit—Decree as to amount of land—Rent payable for former years—Rate of rent payable.

The plaintiff sued the defendant for rent of certain lands. The defendant contended that he was not liable for the entire rent, as part of the land was in the plaintiff's possession. The defendant failed to prove his contention, and a decree was given for the full amount claimed. Subsequently the plaintiff again sued the defendant in regard to the same property for arrears of rent for subsequent years at the rate claimed in the former suit. The defendant had the land measured, adduced evidence, and endeavoured to raise the same defence as he had in the previous suit. No allegation was made to the effect that the rent had been altered in consequence of anything that had happened since the previous decision. The Lower Courts, without considering the evidence adduced by the defendant, held that the defendant could not again raise the same contention, as the question had already been considered and determined in the previous suit, and was *res judicata* between the parties.

Held, that the previous decision did not operate as *res judicata*, and that the Lower Courts ought to have determined on the evidence adduced what the amount of rent in question was.

THE facts in this case were as follows:—

The plaintiff was the owner in *patni* and *sepatni* rights of an eight-anna share in certain property and made separate collections.

* Appeal from Appellate Decree No. 1003 of 1891, against the decree of J. Whitmore, Esq., District Judge of Birbhum, dated the 10th of April 1891, modifying the decree of Babu Debendra Nath Roy, Munsif of Dubrajpur, dated the 27th of September 1890.

(1) 15 W. R., 87. (2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.

In that property the defendant held a *jote* which consisted of 15 bighas and 16 cottahs of land, and bore a rental of Rs. 29-13. The plaintiff realized his share of rent from the defendant from 1291 to Pous kist 1294 (1884 to December 1885) by bringing a suit, No. 286 of 1888, in the Munsif's Court at Dubrajpur. The defendant contended in that suit that he was not liable for the entire rent claimed, as a portion of the land comprised in the tenure was in the possession of the plaintiff himself. The Court decided against the defendant on the ground that he had failed to prove his contention. The defendant appealed, and his appeal was dismissed by the District Judge of Birbhum, who took the same view as the Munsif, and held that the burden of proof was on the defendant and that he had failed to discharge it. The result was that the plaintiff obtained a decree for the rent of the years then in question at the rate of Rs. 29-13 per annum.

The plaintiff not having been able to recover any rent for the years 1294 to 1296 (1887 to 1889), brought the present suit to recover his share of the rent of the same tenure for those years. The plaintiff's allegations as to the area of the land and the amount of the rent were the same as in the previous suit. And the defendant's contention was substantially the same. Both the Lower Courts held that the question of the amount of annual rent payable by the defendant was *res judicata*, and the plaintiff's claim was decreed in full.

From this decision the defendant appealed to the High Court.

Babu *Dwarka Nath Chuckerbutty* for the appellant.

Babu *Karuna Sindhu Mukerjee* for the respondent.

Babu *Dwarka Nath Chuckerbutty*:—The decisions of the Lower Courts are wrong, for whatever may have been the decision in the former suit, it should not have treated as a bar to this suit. In the former suit the plaintiff claimed more than he was entitled to: the *onus* was put on the defendant, and he failing to prove his contention, the plaintiff obtained a decree for the full amount claimed. In the former suit there was no finding as to what the area of the land was, and if no area was determined, no rent could have been fixed. That was simply a decision as to how much money was due to the plaintiff from the defendant for the years

1893

NIL MADHUB SARKAR v. BROJO NATH SINGHA.

claimed. It is still open to the defendant to prove by measurement that he is entitled to a reduction of rent under section 52 of the Tenancy Act; if so, it cannot be said that the rent of this land has been determined. The only question both in the former and in the present suit is, what is the area of the land? the amount of rent has never been disputed. In the present suit the cause of action is quite distinct: it is for rent accruing from year to year, and each year creates a different cause of action. Had it been a question of what was the yearly rental, and a decision had been given on that point, then it would have been a bar to the present suit, and the defendant would have been bound by the numerous authorities on that point. But in this case the question is, what is the area of the land? On that point the case of *Roghoonath Mundul* v. *Juggnt Bundhoo Bose* (1) supports the appellant's case. In that case the ryots alleged that the amount of rent and the extent of land had been overstated, but the Court decided that the ryots were bound by a *jummabundi* signed by them. Nevertheless the High Court held that the question could still be raised by the ryots in a subsequent suit.

Babu *Karuna Sindhu Mukerjee* for the respondent:—If the decision in the previous suit was "what is the annual rent of the land" for the years for which rent was sought, it is clearly under the authorities, *Jeo Lal Sing* v. *Surfun* (2), *Mon Mohinee Debee* v. *Binode Beharee Shaha* (3), *Nobo Doorga Dossee* v. *Foyzbux Chowdhry* (4), *Bussun Lall Shookul* v. *Chundee Dass* (5), and *Hurry Behari Bhagat* v. *Pargun Ahir* (6), a bar to the amount being disputed in the present suit.

The decision in the former suit is a distinct finding as to the amount of land and the rate per annum for such land, and is therefore a finding as to what is the amount of rent for the land in question. The authorities show that the decision as to the amount of the rent cannot be questioned in a subsequent suit in respect of the same cause of action, nor can it be questioned in the present suit, and this appeal should be dismissed with costs.

(1) I. L. R., 7 Calc., 214.
(2) 11 C. L. R., 483.
(3) 25 W. R., 10.
(4) I. L. R., 1 Calc., 202.
(5) I. L. R., 4 Calc., 686.
(6) I. L. R., 19 Calc., 656.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The facts are shortly these. In 1888 the plaintiff sued the defendant for his share of the rent of a tenure for the years 1291 (1884) to 1293 (1886) and part of 1294 (1887), alleging that the tenure contained 15 bighas 16 cottahs of land, and that the annual rent payable was Rs. 29-13. The defendant contended that he was not liable for the entire rent claimed, as a portion of the land comprised in the tenure was in the possession of the plaintiff himself. It does not appear that any issues were framed, or that there was any measurement of the land, but the first Court, after considering the evidence which the defendant adduced, rejected his contention on the general ground that he had failed to prove it. The defendant appealed, and his appeal was dismissed by the District Judge, who took the same view as the Munsif, and held that the burden of proof was on the defendant, and that he had failed to discharge it. The result was that the plaintiff obtained a decree for the rent of the years then in question at the rate of Rs 29-13 per annum.

The present suit is for the plaintiff's share of the rent of the same tenure for the years 1294 to 1296 (1887 to 1889), the plaintiff's allegations as to the area of the land and the amount of the annual rent being the same as in the previous suit. The defendant's contention is also substantially the same, *viz.*, that he obtained possession of only 8 bighas 12 cottahs of land, the annual rent of which would be Rs. 13-0-6. He further contended that the land was misdescribed, and that some of the plots mentioned in the plaint did not exist. He does not, however, say that the rent has been altered in consequence of anything which has happened after the decision in the suit of 1888.

Both the Courts have held that the question of the amount of the annual rent payable by the defendant is *res judicata*, and the claim has been decreed in full without any consideration of the evidence which the defendant adduced in support of his contention or of the proceedings of the amin who was deputed to measure the land.

It is urged, and we think successfully, that the decisions are wrong, and that the Court ought to have determined on the

1893

NIL MADHUB SARKAR v. BROJO NATH SINGHA.

evidence now adduced what the annual rent for the years in question is.

The decision in the suit of 1888 went no farther than this, that the defendant, upon whom the burden of proof lay, had failed to make good the plea he advanced, and the necessary consequence was that he failed to get the relief asked for, that is to say, a reduction of the rent for the years for which the rent was then claimed. But the cause of action is in this case different, each year's rent being in itself a separate and entire cause of action, and the mere failure of the defendant to prove what he tried to prove in the previous suit would not, we think, prevent him from proving it in this. The case might have been different if the Court had in the previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable for the same. It might then be said that the determination was general, and not limited to the particular years for which rent was claimed, and that the defendant could only succeed in the present suit by proving that the area and rent had since altered. The determination was not, however, of that character, and there is nothing in the judgment to indicate that the Court intended to decide anything more than it was strictly necessary to decide for the purpose of the suit, *viz*, the amount of money which the plaintiff was to recover for the years then in question.

The cases of *Bussun Lall Shookul* v. *Chundee Dass* (1) and *Nobo Doorga Dossee* v. *Foyzbux Chowdhry* (2) cited for the respondent are, we think, distinguishable. In the first of these the question raised as to the area of the tenure had been put in issue and definitely decided in a previous suit for the rent of the tenure. In the second, which was a suit for abatement of rent, it was held that the exact amount of abatement to which the plaintiff was entitled had been raised and determined in a suit previously brought against her for the rent of the tenure, and that the determination was not merely for the year in respect of which the rent was claimed, but for all future years.

We cannot say that the questions which the defendant raises in this suit were heard and finally determined in the suit of 1888.

(1) I. L. R., 4 Calc., 686. (2) I. L. R., 1 Calc., 202.

1893

NIL MADHUB SARKAR v. BROJO NATH SINGHA.

It is still, we think, open to the defendant to prove by measurement that he is entitled to a reduction of rent under section 52 (B) of the Tenancy Act, and if that question is open, it cannot be said that the area of his holding or tenure has been determined.

The case of *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (1) seems to us to be more in point than the cases cited on the other side and referred to above.

We would also notice that the decree leaves it undecided whether certain of the plots for which rent is now claimed are correctly described in the plaint and are the same as those for which rent was claimed in the suit of 1888. The defendant is clearly entitled to have this point decided in the present case.

We set aside the decrees of both the Courts. The case must go back to the Court of first instance in order that all the other questions which arise may be disposed of.

The appellant will get his cost in this Court. The costs incurred in the Lower Courts will abide the result.

Appeal allowed and case remanded.

C. S.

REFERENCE UNDER STAMP ACT.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris, and Mr. Justice Pigot.

IN THE MATTER OF KO SHWAY AUNG AND OTHERS, *v.* STRANG STEEL AND Co.

1893 *July* 20.

Stamp Act I of 1879, *Schedule I, Arts.* 29 *and* 41 (*b*)—*Mortgage advance payable on demand—Power of sale in default of repayment of advance.*

In consideration of an advance of Rs 1,450, on interest, repayable on demand, certain boat-owners assigned to S. and Co. their paddy boats, the boat-owners retaining, working, and being responsible for the safety of, the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to S. and Co., and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S. and Co. On failure to make repayment on demand, S. and Co. were empowered to take

* Stamp reference No. 2 of 1892, made by W. F. Noyce, Esquire, Secretary to the Financial Commissioner, Burma, dated the 11th October 1892.

(1) I. L. R., 7 Calc., 214.

1893

IN THE MATTER OF KO SHWAY AUNG v. STRANG STEEL AND CO.

possession of and to sell the boats. *Held*, that the document was a mortgage and not a pledge, and as such should be stamped under article 44 (*b*) of Schedule I of the Stamp Act of 1879.

THIS was a reference under section 46 of the Stamp Act of 1879, made by the Financial Commissioner of Burmah, as to the duty payable on the document hereinafter set out, that officer being of opinion that the document was a mortgage, and as such liable to duty under article 44 (*b*), and not under article 29 of schedule I to the Act, as contended by Messrs. Steel and Co.

"This agreement made the 18th day of October 1890, between Ko Shway Aung, Ko Kyah Khine, and Ko Phoo Htaintabin (hereinafter called the boat-owner or boat-owners) and Messrs. H. Strang, Steel and Co. (hereinafter called the Company).

"In consideration of the sum of Rupees one thousand four hundred and fifty only advanced by the said Company to Ko Shway Aung, Ko Kyah Khine, and Ko Phoo, he or they, the said Ko Shway Aung, Ko Kyah Khine and Ko Phoo, do hereby assign unto the said Company his or their paddy-boat or boats and all the property specifically described in the list hereto annexed, the said boat-owner or boat-owners covenanting that the said boat or boats and other property are his or their own absolutely, free from all incumbrances.

"2. The said boat-owner or boat-owners agree to apply the said sum of rupees one thousand four hundred and fifty solely to the purpose of supplying paddy to the said Company.

"3. The said boat-owner or boat-owners agree to pay interest on the said sum of rupees one thousand four hundred and fifty, or so much thereof as may be due from time to time, at the rate of one per cent. per mensem.

"4. The said boat-owner or boat-owners shall remain in possession of the said boat or boats and the said property subject to the conditions hereinafter contained. While the said boat-owner or boat-owners continue in possession of the said boat or boats, he or they shall be liable for any damages the said boat or boats may sustain, and he or they shall be responsible for the safe keeping of same.

"5. While and so long as the said sum of rupees one thousand four hundred and fifty only, or any part thereof or any part of the interest thereon remains unpaid, the said boat-owner or boat-owners shall not be at liberty to hire or let out the said boat or boats to any person for any purpose whatever, but agree to use the said boat or boats solely for the purpose of supplying paddy to the said Company under this present agreement, and to make not less than six trips for that purpose every month, and at the end of every trip to deliver his or their paddy, without delay at the godowns of the said Company or at any place in Kewendine where he or they

shall be directed by the Agents or Managers of the said Company so to deliver it.

"6. All paddy delivered under this agreement to be paid for at the market rate for advance paddy on the date of the arrival in Kewendine of the said boat or boats.

"7. The said boat-owner or boat-owners further agree on demand to pay to the said Company, at the head office thereof in Rangoon, the said sum of rupees one thousand four hundred and fifty with interest as aforesaid, or any sum then remaining due on the security of these presents.

"8. On payment as aforesaid of all sums due on the security of these presents, the said Company shall have no further lien on or claim to the boat or boats or property as aforesaid.

"9. If the said boat-owner or boat-owners fail to repay on demand the said sum of rupees one thousand four hundred and fifty, together with interest thereon and all moneys at any time due on the security of these presents, the said Company shall be entitled to take immediate possession of the boat or boats and property aforesaid, and to sell the same in any way that shall to the said Company seem fit, and to apply the proceeds of such sale firstly in paying their expenses incurred in and about such sale, and next towards the payment of any sum then remaining due on the security of these presents, and shall pay the surplus, if any, to the said Ko Shway Aung, Ko Kyah Khine, and Ko Phoo.

"10. If the said proceeds are not sufficient for the payment in full of the said expenses and of all sums so remaining due as aforesaid, the said boat-owner or boat-owners binds himself or themselves to make good the deficiency.

(Sd.) W. STRANG STEEL.
B. NYWAY."

The *Advocate-General* (Sir *Charles Paul*) for the Crown, contended that duty was leviable under article 44, referring to Fisher on Mortgage, art. 22.

No one appeared on the other side.

The opinion of the Court (PETHERAM, C.J., NORRIS and PIGOT, JJ.) was as follows:—

This reference has been already twice before the Court, but could not be disposed of, as on neither occasion was the document in respect of which it is made or a copy of it produced. This has now been done. We think the instrument is a mortgage. The interest in the subject matter of it, the boats, etc., is by the terms of the instrument assigned to the mortgagees with a provision allowing the mortgagors to remain in possession on

1893

IN THE MATTER OF KO SHWAY AUNG v. STRANG STEEL AND CO.

certain conditions: and the mortgagees are given a power of sale. No doubt a special agreement giving a power of sale does not necessarily operate so as to show that the transaction is not a pledge, but must be construed to be a mortgage: (Fisher on Mortgage, article 22.) But here we think the whole character of the instrument points one way, and that it is a mortgage; there is no provision for anything in the nature of a delivery actual or constructive; there is no pledge.

That being so, article 44 applies. We think the distinction between articles 29 and 44 is correctly stated by Mr. Donogh in his book on the Stamp Act, in the note to article 44, "*Article* 44 *distinguished from art.* 29." 'Article 44 deals with cases in which the interest in, or right over, property is transferred whether possession is given or not, for the purposes of the mortgage; art. 29 is limited to cases where moveable property only is given in pledge, coupled with an agreement securing the repayment of a loan.'

The Government notification of 5th June 1885, referred to in the note to article 29 in that book, is worth noticing; but as to this, it need only be observed that in professed exercise of the powers conferred by the Act, Government permitted the levy of a stamp of the value required under article 29, upon this particular sort of mortgage referred to in the notification.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

1893. *December* 13.

LEP SINGH KHASIA AND OTHERS (DEFENDANTS) *v.* NIMAR KHASIA AND OTHERS (PLAINTIFFS).*

Possession—Proof of possession—Title, proof of—Suit for damages for value of fruit taken from garden—Right of suit.

A suit for damages for the value of fruit crops taken away by the defendant from a garden alleged to be in the plaintiff's possession, can be sustained on the finding that the plaintiff was in possession up to the date

* Appeal from Appellate Decree, No. 781 of 1892, against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 2nd of February 1892, affirming the decree of Babu Atool Chunder Ghose, Subordinate Judge of that district, dated the 17th of February 1891.

of the institution of the suit; it is not necessary for him to prove his title to the land, unless the defendant shows a better title.

In this case, there being no sufficient findings of the plaintiffs' possession to the date of suit, nor that the defendant had failed to show the better title, the suit was remanded for such findings.

THE suit out of which this appeal arose was brought to recover Rs. 1,489, the value of oranges and betelnuts which the plaintiffs alleged were wrongfully taken from their garden by the defendants.

The defendants denied the plaintiffs' title, and alleged that they themselves were owners of the garden.

The first Court, the Subordinate Judge, made a decree in favour of the plaintiffs, on the grounds that they had made the garden and were in possession of it. He found that "it is not necessary to determine the question of title in this suit."

The Judge on appeal said:—

"The defendants contend that the plaintiffs are not the owners of the garden; that some of the defendants own it; that it was made by Joymoni Roy and Jasmant Roy; that certain persons styled sirdars dispossessed Joymoni and Jasmant; that Joymoni sued to recover possession, and obtained a decree for an 8-anna share of the garden and took possession in execution of the decree. The defendants further contend that the plaintiffs are acting on behalf of the sirdars who were sued by Joymoni.

"When the land was surveyed, it was shown as jungle land, and the names of Joymoni and Jasmant were entered as proprietors in the *wajib-ul-arz*. The defendants claim to be the representatives of Joymoni and Jasmant.

"The two important points for consideration seem to be, what is the effect of the decree obtained by Joymoni and of the possession which he took in execution of the decree; secondly, have plaintiffs possessed the garden.

"In the suit brought by Joymoni, the sirdars asserted that they had caused the garden now in suit to be made: they did not say that other persons were in possession of it. The claim in that suit referred also to another garden to the west of the public road, to the east of which the garden now in suit lies. The sirdars in that suit asserted that the garden west of the road had been settled with them: the claim for the garden west of the road was dismissed. It is clear that the sirdars set up different titles to the different gardens. It has not been shown in this suit that the sirdars among Khasias represent all the villagers. I do not find in the

1898

LEP SINGH KHASIA v. NIMAR KHASIA.

record any document which clearly defines the duties, powers, and rights of sirdars. It seems that they are sometimes dismissed. There is every reason for holding that they are in no sense proprietors of the lands of the village by virtue of their post as sirdars. It has not been shown that they represent the proprietors.

"It is clear that the decree obtained by Joymoni cannot affect any rights the plaintiffs may have had in the land. Joymoni took possession of the land for which he obtained a decree under section 264 of Act XIV of 1882. Such delivery of possession would not in any way affect any rights or possession of the plaintiffs. The Subordinate Judge holds that the plaintiffs have proved that they made the garden and possessed it. There is the evidence of independent witnesses on this point. A European gentleman, who knows the neighbourhood well, has stated that he has seen some of the plaintiffs look after the garden and take fruit: there is also other evidence on this point. I can see no reason for differing from the decision of the Subordinate Judge. I attach no importance to the fact that the names of Joymoni and Jasmant are in the *wajib-ul-arz* : it seems pretty clear that they did not own all the land shown in their names, for they did not have the garden west of the road. There is no doubt, too, that the land was covered with jungle, and entries in the *wajib-ul-arz* with reference to the possession of such land are not of much value. I think the sum allowed in the original suit is not too high. The appeal is dismissed with costs."

From this decision the defendants appealed to the High Court. The grounds of appeal so far as they are material to this report, and the arguments, are sufficiently stated in the judgment of the Court.

Mr *W. C. Bonnerjee*, Babu *Taruk Nath Pandit*, and Babu *Joy Gobindo Shome* for the appellants.

Babu *Tara Kishore Chowdhry* for the respondents.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows :—

Two questions have been raised in this appeal on behalf of the defendants, appellants; *First*, whether there is in the judgment of the Lower Appellate Court any finding that the plaintiffs have made out their title to the garden in dispute, and, *second*, whether if there is no such finding, the decree that the plaintiffs have obtained for the value of fruits wrongfully taken away by the defendants can be sustained upon the finding that the plaintiffs have planted the trees and made the garden and were in possession of it.

Upon the first point there are, it is true, passages in the judgment which, if they stood alone, might be taken as amounting to a finding of title in favour of the plaintiffs. But when we find in the judgment of the first Court an express statement that "it is not necessary to determine the question of title in this suit," and when the Lower Appellate Court affirms that judgment, and states that the two important points for consideration are "what is the effect of the decree obtained by Joymoni (through whom the defendants claim) and of the possession which he took in execution of the decree, and, secondly, have plaintiffs possessed the garden," we do not think we can hold that the Court of Appeal below has found title for the plaintiffs.

It becomes necessary, therefore, to consider the second point. For the appellants it is urged that the plaintiffs are not entitled to any decree for the value of the fruits taken away from the garden, unless they can make out their title to the garden; while the other side contend that the decree given to them can be sustained upon the finding arrived at in this case that they made the garden and possessed it.

No authority was cited in support of the appellants' contention; but the learned Counsel for the appellants argued that, just as in an ordinary suit for possession of land, the plaintiff is not entitled to a decree unless he establishes his title to it, so in a suit for the value of the produce of land wrongfully taken away, the plaintiff cannot get a decree unless he can show that he is entitled to the land. We do not see how this at all follows. The reason why in an ordinary suit for possession of land the plaintiff cannot succeed except upon proof of his title is because the party in possession is considered to be entitled to retain such possession against every one except the rightful owner. And for that very reason it would follow that the party in possession of any land must be held entitled to recover the value of the produce of the land from any person who has taken it away, unless such person is the rightful owner. Such a rule appears to us to be in accordance with reason and common sense. For if the party in possession were to be held not entitled to maintain a suit for the value of the produce misappropriated by a wrong-doer, there would be very little real protection afforded to possession, and

1893

LEP SINGH KHASIA v. NIMAR KHASIA.

there would often arise the most unseemly struggle to misappropriate produce, whenever it is of such a nature as to be easily carried away, and there is known to be some flaw in the title of the party in possession.

The learned Vakil for the respondent cited the case of *Ram Mohun Dass* v. *Jhupuroo Doss* (1) as favouring his view. That case does not go far enough, but so far as it goes it is in his favour. There is, however, another case, not cited in the argument, which lends greater support to his contention. It is the case of *Radha Charan Ghatak* v *Zamirunnissa Khatun* (2), which was decided by a Bench of three Judges on an appeal under section 15 of the Letters Patent, and in which the question was whether a person who had obtained a decree in a possessory suit under section 15 of the Limitation Act of 1859, could maintain a suit for mesne profits. Sir Barnes Peacock, in delivering the judgment of the Court observed:—"The defendant in the suit for mesne profits had a right to have the question of title tried; but the prior possession of the plaintiff, to which he had been restored under the Act XIV decree, was sufficient *primâ facie* evidence of his title to warrant a decree in his favour against the defendant for mesne profits unless she could prove a better title." If in place of the previous possession, intermediate ouster, and subsequent recovery of possession under the Act XIV decree, we had here continuous possession in the plaintiffs, and an intermediate act of trespass not amounting to ouster and carrying away of the produce, the two cases would be governed by the same principle. The Act XIV decree in the case referred to would make no difference, as it could give the plaintiff in that case no higher rights than those possessed by the present plaintiffs (if they are in possession), that decree being based not upon title, but only upon previous possession. And if the plaintiff in that case could maintain a suit for mesne profits, the plaintiffs in the present case must be held to be entitled to maintain this suit for damages.

Both upon reason as well as upon authority, we think the plaintiffs would be entitled to a decree for damages without proof of title, if it is found *first* that they had been in possession from

(1) 14 W. R., 41. (2) 2 B. L. R., A. C., 67; 11 W. R., 83.

1893

LEP SINGH KHASIA v. NIMAR KHASIA.

before and up to the date of institution of this suit, and *secondly* that the defendants have failed to make out a better title to the garden than the plaintiffs. Upon these two points, however, we do not think that the judgment of the Lower Appellate Court is at all clear. The Lower Appellate Court has not determined the second point, and as to the first, all that it finds is that the plaintiffs have proved that they made the garden and possessed it, but possessed it down to what date the judgment does not show. If the first point is decided in favour of the plaintiffs, they will be entitled to a decree, unless the defendants make out a better title; and if the first point is decided against the plaintiffs, they will not be entitled to a decree unless they make out their title to the garden in dispute.

The decrees of the Courts below will therefore be set aside, and the case remanded to the Lower Appellate Court for a fresh decision, in accordance with the directions contained in this judgment. Costs will abide the result.

Case remanded.

J. V. W.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1893 *Aug. 7.*

SURESH CHUNDER MAITRA, CHAIRMAN OF COMMISSIONERS, RAMPUR BOALIAH MUNICIPALITY (DEFENDANT), *v.* KRISTO RANGINI DASI (PLAINTIFF).*

Second appeal—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882), ss. 586, 646B.

Notwithstanding section 16 of the Provincial Small Cause Courts' Act, the High Court has, on a case being submitted to it under section 646B, Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial.

Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *Held* on a second appeal to the High Court that section 646B of the Civil Procedure Code must be read with s. 16 of the Provincial Small Cause Courts' Act, so as to modify its full effect in a case wrongly tried by an

* Appeal from Appellate Decree No. 964 of 1892, against the decree of Alfred F. Stanbery, Esq., District Judge of Rajshahi, dated the 1st April 1892, modifying the decree of Babu Fani Bhooshun Mukerjee, Munsif of Boaliah, dated the 19th of May 1891.

1893

SURESH CHUNDER MAITRA v. KRISTO RANGINI DASI.

ordinary Civil Court and taken in appeal to the District Court: both parties having submitted to the jurisdiction it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void.

THE plaintiff purchased at a public auction sale a certain house with the land appertaining thereto within the limits of the Rampur Boaliah Municipality. The Municipality closed one of the drains which flowed past the house, with the result that it flowed over and injured the plaintiff's property, bringing down the western wall and a privy. The plaintiff then gave the Municipality notice to reconstruct the wall or to pay Rs. 125 in damages. As no notice was taken of this demand, the plaintiff filed a suit in the Munsif's Court asking to have the wall reconstructed or for damages as demanded. The Munsif dismissed the plaintiff's suit. From this decision the plaintiff appealed to the Judge of Rajshahi, and the learned Judge, reversing the decision of the Munsif, gave the plaintiff a decree, but assessed the damages at Rs. 90.

From this decision the defendant appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Monmotho Nath Mitter* for appellant.

Babu *Akhil Chunder Sen* for respondent.

The arguments for the purposes of this report are sufficiently set out in the judgment of the Court (PRINSEP and BANERJEE, JJ.), which was as follows:—

This suit as brought was cognizable by a Small Cause Court, and inasmuch as there was a Small Cause Court having jurisdiction in that particular locality, it should have been brought in that Court. Nevertheless the Munsif without any objection being raised tried the suit and dismissed it. The plaintiff appealed, and in the Court of the District Judge also no objection of this kind was raised; but the order of the Munsif was set aside and a decree was given for the plaintiff for damages, but in a sum smaller than that claimed.

The defendant has now preferred a second appeal against the appellate decree. An objection is raised by the plaintiff that a second appeal would not lie by reason of section 586 of the Code of Civil Procedure, the subject-matter of the original suit not exceeding 500 rupees. To this the defendant-appellant replies

that the Courts below had no jurisdiction at all over the subject-matter of the suit, inasmuch as this suit should have been brought in a Small Cause Court, and therefore a second appeal lies in a matter of jurisdiction, on the authority of the case of *Dyebukee Nundan Sen* v. *Mudhoo Mutty Gupta* (1). The law has, however, been altered since the passing of that decision, and it seems to us to stand at present on entirely different ground.

Section 16 of Act IX of 1887, the Provincial Small Cause Courts' Act, declares that a suit cognizable by a Small Cause Court shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. So that under that section the suit could not have been tried by the ordinary Courts as it has been. But Act VII of 1888, section 60, has introduced section 646 B into the Code of Civil Procedure which modifies the operation of section 16 of the Small Cause Court Act, and introduces an entirely different principle. Under that section, in a case such as that now before us, properly triable only by a Small Cause Court but tried by an ordinary Civil Court, on an appeal preferred the District Court may, and, if required by a party, shall, submit the record to the High Court, with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous: and it is further enacted that "on receiving the record and statement, the High Court may pass such an order in the case as it thinks fit." No doubt under this last clause if standing alone it might be held that the decision of the High Court should be limited only to the question of jurisdiction, but the previous clause shows that this was not the intention of the Legislature. If the question of jurisdiction were alone involved, it could be dealt with by the District Court on appeal. But such action of the District Court is restrained. If no objection as to jurisdiction is raised, the District Court is left to act in exercise of its own discretion either to decide the appeal or to submit the case to the High Court. If, however, the parties so require it, the District Court has no discretion at all: it is bound to submit the case for the orders of

(1) I. L. R., 1 Calc., 123; 24 W. R., 478.

1893

SURESH CHUNDER MAITRA v. KRISTO RANGINI DASI.

the High Court. So that, as we read the law, on a case so submitted the High Court has full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial. Unless this is the intention of the Legislature, the enactment of section 646B seems to be without any meaning or object. Consequently section 646B must be read with section 16 of the Provincial Small Cause Courts Act so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken on appeal to the District Court. In this view of the law we are of opinion that the parties having in both the lower Courts submitted to the jurisdiction of the ordinary Courts, it is not competent to either of them on second appeal to plead the want of jurisdiction in those Courts so as to render all proceedings taken in the suit void. The defendant, however, contends that he is entitled to a second appeal, and to ask for judgment on points other than that of the special jurisdiction. But the suit is of the nature cognizable by a Court of Small Causes, and the amount of the subject-matter does not exceed five hundred rupees, so that a second appeal is barred by section 586 of the Code of Civil Procedure. The second appeal must, therefore, be dismissed with costs.

C. S. *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1893 *Aug.* 7.

JIBAN DAS OSWAL AND ANOTHER (PLAINTIFFS) *v.* DURGA PERSHAD ADHIKARI AND OTHERS (DEFENDANTS).*

Res judicata—Suit for possession and mesne profits—Ex-parte decree for possession without mention of mesne profits—Subsequent suit for same mesne profits and for subsequent mesne profits—Civil Procedure Code (Act XIV of 1882), *s.* 13.

A suit was instituted for recovery of possession and for mesne profits. An *ex-parte* decree for possession only was made, but the decree was silent as regarded the mesne profits. Subsequently a second suit was instituted

* Appeal from Appellate Decree No. 711 of 1892, against the decree of Babu Hurro Gobind Mukerjee, Subordinate Judge of Jalpaiguri, in Rungpore, dated the 17th of February 1892, modifying the decree of Moulvie Ibrahim Ahmed, Munsif of Jalpaiguri, dated the 30th of November 1891.

for the same mesne profits, as well as for mesne profits for a subsequent period. *Held*, that the claim for mesne profits prior to the institution of the first suit was barred under section 13 of the Civil Procedure Code.

A CERTAIN jote was sold for arrears of rent and was purchased by the plaintiffs at an auction sale. Not being able to obtain possession, the plaintiffs instituted a suit for possession, and for mesne profits for the years 1294, 1295, 1296 (1887, 1888, 1889). A decree was passed *ex-parte* on 11th July 1890 in favour of the plaintiffs, giving them possession, but the decree was silent as regarded the claim for mesne profits. On the 8th of April 1891 the plaintiffs instituted another suit to recover the mesne profits sought to be recovered in the previous suit and mesne profits for a period subsequent to the suit [the first eight months of 1297 (1890)]. The defendants contended that the claim for the years 1294 to 1296 (1887 to 1889) was barred under section 13 of the Civil Procedure Code, and that the claim with respect to the year 1294 (1887) was barred by limitation. The Munsif decreed the suit with costs. On appeal the Subordinate Judge allowed the claim for the first eight months of the year 1297 (1890), and found that the claim for the years 1294—96 (1887—1889) was barred as being *res judicata*.

From that decision the plaintiffs appealed to the High Court.

Babu *Joygsh Chunder Roy* for the appellants.

Babu *Baidya Nath Dutta* for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit for mesne profits. The Lower Appellate Court has held that the plaintiffs' claim for a portion of the time for which mesne profits are sought to be recovered is barred as *res judicata*.

On second appeal it is contended on behalf of the plaintiffs that the decision of the Lower Appellate Court is wrong. We do not think this contention is sound. In their suit for possession the plaintiffs claimed mesne profits in respect of the time between the date of dispossession and the date of suit, and the decree in that suit said nothing about the claim for mesne profits. In the present suit the plaintiffs claim mesne profits as well in respect of the

1893

JIBAN DAS OSWAL v. DURGA PERSHAD ADHIKARI.

period preceding the date of institution of the former suit as in respect of the period succeeding that date and extending up to the date of recovery of possession. The Court of Appeal below has held that the claim in respect of the former period is barred, but that in respect of the latter period is not. The learned vakil for the appellant contends that as there was no issue tried upon the question of mesne profits claimed in the former suit, the decision in the former suit cannot operate by way of *res judicata*. This contention is, in our opinion, clearly opposed to the provisions of Explanation III to section 13 of the Code of Civil Procedure, which provides that any relief claimed in the plaint, which is not expressly granted in the decree, shall for the purpose of that section be deemed to have been refused. In the present case mesne profits in respect of the period prior to the date of the former suit were clearly claimed in the plaint in that suit, and were not expressly granted by the decree. They must, therefore, under Explanation III be deemed to have been refused for the purposes of section 13, that is, as we understand it, for the purpose of determining the question whether that part of the claim should or should not be held to be barred by the principle of *res judicata* in this second suit. Now, if it is to be deemed to have been refused, we must hold that the matter in respect of the mesne profits in question was determined by the former suit, and determined adversely to the plaintiff; and if that is the proper meaning of Explanation III, that part of the claim can no longer be adjudicated upon.

It was urged for the appellants that the decision of this Court in the case of *Mon Mohan Sarkar* v. *Secretary of State for India* (1) is authority in favour of their contention. We do not think so. All that was decided in that case was that the prayer for mesne profits in a former suit, in respect of the period between the date of the institution of the suit and the date of delivery of possession, not being granted in that suit should not be held to operate by way of *res judicata* in a second suit for mesne profits for the same period; and the ground upon which that decision is expressly based is that it is not obligatory on the Court to grant

(1) I. L. R., 17 Calc., 968.

such relief, but that the Court may in its discretion grant mesne profits in respect of the period following the date of suit or not. It was accordingly held that the not granting of that which the Court was not bound to grant, and which the Court might or might not have granted, should not necessarily raise the inference that it was refused. That case, therefore, has no application to the present.

It was further argued that Explanation III is meant only to bar so much of the claim as is expressly dealt with in the judgment but is not referred to expressly in the decree. We find neither reason nor authority for such a contention. If any matter is expressly dealt with in the judgment, the principle of *res judicata* would apply to it, notwithstanding that the decree does not refer to it expressly, by reason of the express words in the enacting part of section 13 which says: "No Court shall try any issue which has been heard and determined in a former suit;" and if the object of Explanation III was merely to prohibit the trial in a second suit of an issue already tried and determined in a former suit, notwithstanding the absence of any allusion in the decree to the matter so dealt with, Explanation III might as well have not been given.

For all these reasons we think that the decision arrived at by the Lower Appellate Court is correct and that this appeal must be dismissed with costs.

Appeal dismissed.

C. S.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

ABDUL LOTIF (PLAINTIFF) *v.* YOUSUFF ALI AND OTHERS (DEFENDANTS).*

1893
August 8.

Right of suit—Decree setting aside sale, effect of not executing, within six months—Sale, validity of—Right of auction-purchaser to bring suit for declaration of title and possession—Revenue Sale Law (Act XI of 1859), s. 31.

Certain property having been sold for arrears of Government revenue the defaulting tenant brought a suit in the Civil Court to have the sale set

* Appeal from Appellant Decree No. 3 of 1893, against the decree of C. P. Caspersz, Esq., District Judge of Chittagong, dated the 17th of September 1892, reversing the decree of Babu Shosi Bhusan Chowdhry, Munsif of that district, dated the 29th of February 1892.

1893

ABDUL LOTIF v. YOUSUFF ALI.

aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held*, in a suit brought by the auction purchaser to recover possession of the share he had bought at the sale, that such non-execution of the decree had the effect of restoring the sale so far as it concerned the defaulter, and that the plaintiff was entitled to succeed.

THE facts of this case were shortly as follows:—

On the 12th of September 1879 the plaintiff purchased a one-third share of an estate held by five of the defendants which was sold by public auction for arrears of Government revenue. After his purchase he sold a six-annas share of his share to Mohamed Ali, the sixth defendant. Sarat Chandra, one of the defaulting co-sharers, brought a suit in the Civil Court to have the sale for arrears of Government revenue set aside, and the sale was set aside. Having obtained his decree, Sarat Chandra failed to execute the decree within the six months allowed by the Revenue Sale Law (Act XI of 1859, s. 34), and on his applying to execute his decree the Civil Court held that he had abandoned his right to execute the decree obtained by him, as the application had not been made within the six months allowed by the Revenue Sale Law. On appeal the High Court upheld that decision. The plaintiff then instituted six suits to establish his proprietary right to the lands, as being part of his share of the estate, claiming to be entitled to hold them jointly with the defendants. All the cases were, by the request of the parties, tried together. The Munsif gave the plaintiff a decree in all the suits, holding that as the decree had not been executed within the six months allowed by law, that the sale stood good. On appeal the District Judge held that inasmuch as the sale was set aside, the plaintiff had no right to sue, and reversed the Munsif's finding.

From this decision the plaintiff appealed to the High Court.

Babu *Akhil Chunder Sen* for the appellant.

Mr. *M. L. Sandel* for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

The defendants, respondents in this case, are co-sharers in an estate, holding shares recorded separately, who defaulted in

payment of Government revenue, and their shares were sold up. The plaintiff, appellant before us, purchased under the Revenue Sale Law of 1859. A suit was brought to set aside that sale by one only of the defaulters, and he obtained a decree; but he brought himself within the operation of section 34 of the Revenue Sale Law of 1859, inasmuch as he failed to execute his decree within six months from the date thereof. He attempted to execute that decree in respect of costs, and execution was refused by reason of section 34. The plaintiff, who was the purchaser, now sues to recover possession of the recorded share that he bought, and he obtained a decree in the Court of the Munsif. In appeal the District Judge has considered only one point, namely, the effect of the decree setting aside the sale, and whether the plaintiff, the sale having been set aside by that decree, had any right as purchaser to sue for possession. The District Judge has held that inasmuch as the sale was set aside, the plaintiff has no right to sue.

An objection was raised before him that the decree was not evidence in the present case, but it was disallowed, on the ground that it is admissible under section 42 of the Evidence Act, since it relates to a matter of a public nature; and the Judge has found that it was of a public nature by reason of the publicity of the proceedings in the Collector's Court. We think that the Judge has misapprehended the meaning of section 42 of the Evidence Act. A suit to set aside a sale for arrears of revenue concerns only the parties to that suit, and is no more of a public nature than any other suit, and the publicity of the sale cannot affect the nature of the suit or the decree passed. It cannot affect the public which of the parties was successful in that suit. The illustration to section 42 shows the class of decrees that the Legislature had in contemplation.

The Judge has failed to appreciate the position of the parties in this case. Section 34 declares that if a sale made under the Revenue Sale Law of 1859 be annulled by a final decree of the Civil Court, the application for execution of such decree shall be made within six months after the date thereof, otherwise the party in whose favour such decree was passed shall lose all benefit therefrom. Now, although under this law defaulters have lost all

1893

ABDUL LOTIF v. YOUSUFF ALI.

benefit from this decree, the effect of the Judge's order declaring that the purchaser has no right, title or interest must be to give the property to the defaulters; in other words, to give them the benefit of the decree by holding that the sale to the plaintiff has been set aside. The only parties affected by that decree were the defaulters and the auction-purchaser; and if the defaulter is to get no benefit from the result of the suit brought by him and the decree which he obtained, it follows that the purchaser must be restored to his previous position. It seems to us, therefore, that the effect of section 34 of the Revenue Sale Law, by reason of the neglect on the part of the defaulter to take advantage of the decree obtained by him annulling the sale, is to restore that sale so far as concerns the defaulter or those whose rights were sold at that revenue sale, and who have not thought it proper to join in the suit to have the sale set aside.

It is pointed out to us that, after hearing the argument on the other points raised in the appeal before him, the District Judge thought it necessary only to refer to this one point; and that, therefore, it should be assumed that he has found against the respondents on all other points. We cannot accept this view of the case. It seems to us clear that, although the District Judge may have heard the other points argued, he decided only this one point. It is impossible to say what his opinion on the other objections raised were. If it had been expressed, the parties might have had just ground to dispute them on second appeal.

The appeal must therefore be returned to the District Judge for trial of the other points raised before him.

The costs of this appeal will abide the result.

The judgment will also govern the other cases, namely, appeals from Appellate Decrees Nos. 56 to 60 of 1893.

Appeal allowed and case remanded.

C. S.

Before Mr. Justice Norris and Mr. Justice Banerjee.

KALU AND ANOTHER (DEFENDANTS) *v.* LATU (PLAINTIFF).*

1893
August 14.

Decree—Amendment of decree—Limitation Act, 1877, *art.* 178—*Suit for mesne profits while plaintiff is out of possession.*

There is no limitation for an application under s. 206 of the Civil Procedure Code, to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment.

A instituted a suit for declaration of title and for possession. The decree, which was finally confirmed by the High Court, gave her the declaration sought for, but it contained no direction as to the possession, although the judgment stated that she was entitled to possession. A's son (having been substituted in her place) applied to have the decree amended. The Lower Appellate Court held that the application was barred by limitation. The High Court on appeal upheld the Lower Court's order, not on the ground of limitation, but on the ground that the application to amend the decree had been made in the wrong Court. A's son then instituted a fresh suit against the same parties for declaration of title, perpetual injunction, and for mesne profits. *Held*, that the plaintiff was entitled to have the decree amended under s. 206, Civil Procedure Code, and that though the plaintiff's claim to possession was barred, yet his right was not extinguished, and he having therefore a subsisting title, was entitled, though out of possession, to maintain the suit so far as it sought to recover mesne profits.

THE facts of this case are sufficiently stated in the judgment of the Court.

Moulvie *Seraj Islam* for the appellants.

The respondent did not appear.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, respondent, for declaration of his title to, and for recovery of mesne profits for certain years in respect of, a two-annas share of some land, and for a perpetual injunction restraining the defendants from holding possession thereof, on the allegation that

* Appeal from Appellate Order No. 295 of 1892, against the order of Babu Hure Krishna Chatterjee, Subordinate Judge of Chittagong, dated the 17th of June 1892, reversing the order of Babu Atool Chunder Battabyal, Munsif of Satkania, dated the 14th of December 1891.

1893

KALU
v.
LATU.

the plaintiff's mother had obtained a decree for the said share, and that the plaintiff was entitled to the same as the sole heir of his mother.

The defendants, amongst other things, urged that the suit was barred by limitation and also by section 13 of the Code of Civil Procedure, and that the plaintiff, who was out of possession, could not sue for any of the reliefs claimed.

The first Court dismissed the suit, holding that the plaintiff's right to obtain possession was barred, his predecessor in title having sued for possession and having failed to obtain a decree for it, and that being disentitled to possession of the disputed land, the plaintiff could not restrain others from holding possession of the same.

On appeal, the Lower Appellate Court has reversed the first Court's decree, and remanded the case under section 562 of the Code of Civil Procedure, for trial on the merits, holding that though the prayer for declaration of title may be barred, the claim as to the other reliefs was maintainable.

In second appeal, it is contended for the defendants that the Lower Appellate Court was wrong in law in remanding the case for trial on the merits when the suit was not maintainable, the plaintiff's right to recover possession being barred by section 13 of the Code of Civil Procedure, and the allegation in the plaint not being sufficient to entitle the plaintiff to obtain a perpetual injunction.

The admitted facts upon which the argument that the plaintiff has lost his right to recover possession is based, are shortly these:—The plaintiff's mother brought a suit for declaration of her title to, and for recovery of possession of, the property in dispute. The suit was dismissed by the first Court. The Lower Appellate Court, whilst finding in its judgment that the plaintiff in that suit was entitled to possession, gave her a decree which did not contain any direction for delivery of possession to her; and that decree was confirmed by this Court on second appeal. The present plaintiff was subsequently substituted in that decree in the place of his mother as her legal representative, and, in his attempt to recover possession in execution of that decree, he was defeated on the ground that the decree contained no direction for delivery of possession. He then applied to the Lower Appellate Court, under

section 206 of the Civil Procedure Code, for amendment of the decree, but his application was refused as being barred by limitation, and this Court, upon an application under section 622 of the Code of Civil Procedure, declined to interfere with the order of the Lower Appellate Court, on the ground that that Court had rightly refused to amend the decree, as it had no jurisdiction to do so after the decree had been confirmed by this Court.

From the foregoing statement of facts it is clear, no doubt, that the plaintiff's right to recover possession of the property in dispute by a fresh suit is barred by section 13 of the Civil Procedure Code, Explanation III of that section distinctly providing that any relief claimed which is not expressly granted should be deemed to have been refused. But it is equally clear from the judgment of the Subordinate Judge in the former case that the plaintiff's mother was entitled to recover possession, and that it was only by oversight that that relief was not granted by the decree. The plaintiff was therefore clearly entitled to have that decree amended, under section 206 of the Code, by being brought into conformity with the judgment, and we think he is still entitled to have the decree so amended upon a proper application made to the proper Court. Such an application is not, as the Subordinate Judge erroneously held, barred by limitation. It has been held, by the Bombay High Court in *Shivapa* v. *Shivpanch Lingapa* (1) and by the Madras High Court in *Jivraji* v. *Pragji* (2), that there is no limitation for an application under section 206, it being the duty of the Court to amend a decree under that section whenever it is found to be not in conformity with its judgment, and in that view we fully agree. Nor does the refusal of this Court to interfere with the order of the Subordinate Judge declining to amend the decree, stand in the way of a proper application for such amendment being granted by this Court, as this Court refused to interfere, not on the ground of the application being barred by limitation, but on the ground of its having been made to a wrong Court. We are, therefore, of opinion that the plaintiff's right to recover possession is not extinguished, though he is not entitled to do so by a fresh suit. Then, as for his claim for a declaration of title, it is, properly speaking, not barred, but is wholly

(1) I. L. R., 11 Bom., 284. (2) I. L. R., 10 Mad., 51.

1893

KALU v. LATU.

unnecessary, his predecessor in title having already by the decree in the former suit obtained such declaration, and he having been substituted in her place in that decree. That being so, the plaintiff clearly has made out his title to the land in dispute; and that title was a subsisting title at the date of the institution of this suit, as the Lower Appellate Court has found in this case that the dispossession of the plaintiff's predecessor in title took place within 12 years before that date.

The plaintiff, therefore, having a subsisting title is, in our opinion, entitled, though out of possession, to maintain the present suit so far as it seeks to recover mesne profits. The cases of *Dyamoyee Dayee* v. *Modhoo Soodun Mytee* (1) and *Dwarkaram Misser* v. *Jogessur Lall* (2) may be cited as authority in favour of this view.

The remand order made by the Lower Appellate Court should therefore be affirmed, so far as it directs the trial of the suit on the merits, in respect of the claim for mesne profits. The prayer for a perpetual injunction must be disallowed, as no case is made out in the plaint for such relief.

The result is that, subject to the modification indicated above, the order of the Lower Appellate Court is affirmed, and this appeal dismissed, but without costs, as the respondent did not appear.

C. S. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Amir Ali.

1894
Jan. 4.

C. W. GRIFFITHS (PETITIONER) *v.* TEZIA DOSADH (OPPOSITE PARTY).*

Criminal breach of contract—Breach of contract of service—Act XIII of 1859, s. 2,—Statute 4 Geo. IV., Cap. 34, s. 3—Autrefois convict.

A conviction for breach of contract of service under s. 2, Act XIII of 1859, is a bar to any subsequent conviction on the same contract for a further breach for not returning to service.

One Tezia Dosadh, a tea garden coolie, entered into a contract, under Act XIII of 1859 on the 16th May 1893, whereby she

* Criminal Revision No. 8 of 1894, against the order passed by Babu Jagat Chandra Das, Extra Assistant Commissioner of Cachar, dated the 3rd October 1893.

(1) 3 W. R., 147. (2) 21 W. R., 276.

undertook to work on the Cossipur tea estate for a period of 313 days, and she received Rs. 14 on account of the work so to be performed under the contract. On the 18th of May 1893 she refused to carry out the said contract and left the estate. On the 26th of June she was prosecuted by the manager of the estate for fraudulently and wilfully refusing to carry out her contract after having received an advance of Rs. 14 thereon, and on the 29th of July 1893 she was sentenced to one month's rigorous imprisonment. On the 28th of August Tezia Dosadh was released from jail and did not return to the Cossipur tea estate to fulfil her contract. On the 31st of August the manager of the estate again complained to the Extra Assistant Commissioner that Tezia Dosadh had not returned, and asked that she might again be tried. The Extra Assistant Commissoner dismissed the complaint under section 203 of the Criminal Procedure Code, on the ground that the accused having once been tried and punished for refusal to fulfil her contract, could not again be tried for the same offence. The manager then moved the Deputy Commissioner on revision under s. 435 of the Criminal Procedure Code, and he, holding that the contract was still in force, remitted the case to the said Extra Assistant Commissioner, with instructions to him to call upon Tezia Dosadh to fulfill her contract. The Extra Assistant Commissioner again dismissed the complaint on the 3rd of October 1893. The complainant being dissatisfied with the second order of dismissal petitioned the High Court in the exercise of its powers of revision for a rule to show cause why the order should not be set aside.

Mr. *Henderson*, Mr. *Orr*, and Babu *Prasana Gopal Roy* appeared for the petitioner.

Mr. *Henderson* :—The question is whether a servant who has once been convicted for a breach of contract under Act XIII of 1859 can be again convicted for not returning to service. A second conviction would be perfectly legal. The Magistrate in this case has refused to convict, on the ground that the previous conviction is a bar to any subsequent prosecution under the Act. That is wrong, for the contract continues although the servant has once been convicted. The offence consists in a breach of a still subsisting contract of service. The Legislature contemplates that the servant should return to service, otherwise the servant

1894

GRIFFITHS v. TEZIA DOSADH.

would have it in his power to get rid of his contract by his wilful absence, and thus he would be taking advantage of his own wrong. The Magistrate should have convicted. This very matter has been discussed in England, and the cases there decided show that under the English Statute 4 Geo. IV., Cap. 34, section 3 (which is practically identical in its terms with the Indian Act), a servant who has been convicted for absenting himself from his master's service, if he refuse to return to the same service, may be again convicted: See *Unwin* v. *Clarke* (1) and *Cutler* v. *Turner* (2). The Indian Act is based upon the English Statute, and should be construed in the same way. The principle laid down in the English cases ought to be followed in this country, otherwise employers of labour would be under a great disadvantage, and it would be hard upon the master when he engages a servant, say for three years, if the servant could by being once punished for his breach of contract get rid of it, and so by his wrongful act the master should lose his service for the rest of the time.

No one appeared on the other side.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

This is a case under Act XIII of 1859, in which the Magistrate has refused to act against a cooly woman under contract to a tea garden, who has already been committed to prison under the Act, but who on expiry of the sentence has again refused to perform her contract. Mr. Henderson on the authority of some English cases—*Unwin* v. *Clarke* (1) and *Cutler* v. *Turner* (2) under the English Statute 4 Geo. IV., Cap. 34, section 3—contends that a person under contract is liable for successive breaches of the same contract. These cases in our opinion are not completely in point, owing to the difference between the Statute and the Indian Act. The two cases cited proceed on the terms of the Statute. The parts of the Statute upon which the judgments were delivered are not to be found in the Indian Act, and the reasons given for those judgments are consequently not applicable. It is sufficient to state that there is no power given by the Indian Act, as by the English Statute, to discharge a person from liability under the contract, so

(1) L. R., 1 Q. B., 417. (2) L. R., 9 Q. B., 502.

as to show that unless such order be passed, the contract can still be enforced. The object of the Indian Act, moreover, is stated in the preamble to be to punish fraudulent breaches of contract, as well as to enable a contractor to obtain a more speedy remedy than by recourse to the Civil Courts, which would ordinarily have jurisdiction, so as to afford him relief.

We cannot hold that it is the intention of the Legislature that a contumacious labourer under contract should be liable to imprisonment for several terms for several breaches so as to end in his imprisonment until the term of his contract has expired. This might be the consequence of a persistent refusal to perform a contract for labour for a specific term.

We accordingly approve the law laid down by the Magistrate. From the terms of the order of the Magistrate under which the cooly woman has already suffered imprisonment, it would seem that sentence was summarily passed. It is, however, not quite clear what the terms of the order were. We would point out that a Magistrate's order should at the option of the complainant be either for repayment of the advances made (in whole or in part at the Magistrate's discretion), or for performance of the contract, and that it is only on failure to comply with such order that a sentence of imprisonment can be passed. The application is rejected.

C. S.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KAMINI KANT ROY, MINOR, BY HIS NEXT FRIEND AND GUARDIAN AD LITEM CHANDRA MOHAN DEY ROY (DEFENDANT) *v.* RAM NATH CHUCKERBUTTY (PLAINTIFF).*

1893 *August* 4.

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), s. 373—Institution of fresh suit.

Where *A* instituted a suit to establish his right to sell certain property in satisfaction of a decree against *B*, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted

* Appeal from Appellate Decree No. 1336 of 1893 against the decree of Babu Ram Gopal Chaki, Subordinate Judge of Mymensingh, dated 4th of May 1892, affirming the decree of Babu Uma Charan Kur, Munsif of Kishoregunge, dated the 10th of July 1891.

1893

KAMINI KANT ROY v. RAM NATH CHUCKERBUTTY.

another suit to establish his right to sell the same property in satisfaction of another decree against *B*, *held*, that the second suit was not barred by the provisions of s. 373 of the Code of Civil Procedure.

Explanation III of section 13 of the Civil Procedure Code contemplates a decree which does not expressly grant the relief claimed: the termination of a suit by the plaintiff being allowed to withdraw it, without leave to bring a fresh one, is not a bar, under Explanation III, to a subsequent suit in which the same matter is in issue.

THE facts in this case were as follows:—Ram Mohun Roy, who had an interest in certain lands, borrowed certain sums of money. The lender, after obtaining a decree (No. 1082 of 1882) for the sums advanced, sold the decree to the plaintiff, and the latter caused the land in which Ram Mohun Roy had an interest to be attached in execution of that decree. The defendant then put in a claim stating that the interest in the land was his, and the property was released. In 1886 the plaintiff instituted a suit against the defendant to establish his right to sell the property in execution of decree No. 781 of 1884, but withdrew the suit, no permission being given to bring a fresh suit.

On the 16th May 1890 the plaintiff instituted the present suit to establish his right to sell the property in dispute in satisfaction of his decree, No. 1082 of 1882, against Ram Mohun Roy. The defendant contended that the property did not belong to Ram Mohun Roy, but that it belonged to him, and that the plaintiff was not entitled to maintain the suit, as he had on a former occasion unsuccessfully instituted a similar suit against the defendant for a declaration that the property in question belonged to Ram Mohun Roy.

The Munsif overruled the objections, finding that the property belonged to Ram Mohun Roy, the judgment-debtor of the plaintiff, and decreed the suit. On appeal, the Subordinate Judge upheld the Munsif's finding.

From this decree the defendant appealed to the High Court.

Babu *Tarakishore Chowdhry* for the appellant.

Babu *Dwarka Nath Chuckerbutty* for the respondent.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows:—

The plaintiff brought this suit to establish his right to sell the property in dispute in satisfaction of a decree against one Ram

Mohun Roy, which he had purchased; and he alleged in his plaint that upon the attachment by him of the said property in execution of that decree, a claim was preferred by the defendant, upon which the property was released in May 1889.

The defence was that the property did not belong to the judgment-debtor; that it belonged to the defendant; and that the plaintiff was not entitled to maintain the suit, as he had on a former occasion unsuccessfully instituted a similar suit against the defendant for obtaining a declaration that the property in question belonged to the judgment-debtor.

The Courts below have overruled the objections raised by the defendant, and found that the property belonged to the judgment-debtor of the plaintiff; and they have accordingly decreed the suit.

On second appeal it is contended on behalf of the defendant—*first*, that the suit is barred by sections 13 and 373 of the Code of Civil Procedure; and *secondly*, that the decision on the merits in favour of the plaintiff is wrong in law, as the only evidence on which that decision is based is a recital in a document, which recital is inadmissible in evidence against the defendant.

The facts upon which the first contention is based are shortly these. The plaintiff in execution of a decree held by him against the judgment-debtor Ram Mohun Roy, attached the property now in dispute. Thereupon a claim was preferred by the present defendant, and the property was released. The present plaintiff then brought a suit to establish his right to sell the property in execution of his decree, and that suit the plaintiff withdrew without leave to bring a fresh suit. It is thereupon contended, in the first place, that section 13 of the Code bars the suit, and that as in the former suit the plaintiff sought to establish the right of his judgment-debtor Ram Mohun Roy, to this property, and as he did not obtain any decree in that suit, it must be held, under the third explanation to section 13, that the relief that was claimed had been refused; and it is further contended that even if section 13 is not applicable, the present suit is barred under section 373 of the Code of Civil Procedure, it being a suit for the same matter as that for which the former suit was brought. With regard to the first part of this contention it is enough to say that Explanation III evidently contemplates a decree being passed which does

1893

KAMINI KANT ROY v. RAM NATH CHUCKERBUTTY.

not expressly grant a certain relief, and it lays down that such relief must in that case be deemed to have been refused. In the present case the former suit did not result in any decree. That suit was not heard and determined, but was allowed to be withdrawn, though without leave to bring a fresh suit. That being so, section 13 can have no application in this suit.

The only question then is, whether section 373 of the Code is a bar to the present suit. That section provides that if the plaintiff withdraws from the suit without permission to bring a fresh suit, he shall be precluded from bringing a fresh suit for the same matter. Now, though the property in respect of which the present suit is brought is the same as that in respect of which the former suit was brought, still that would not be sufficient to make the present suit one for the same matter as that for which the former suit was brought, within the meaning of section 373. The object of the former suit was to establish the plaintiff's right to bring to sale certain property which no doubt was the same as that in dispute now, and his cause of action was the release of that property from attachment upon a claim being preferred by the present defendant. The object of the present suit is to establish the present plaintiff's right to bring to sale the same property, but in execution of a different decree, and we may observe, a decree originally obtained by a third party, who has transferred it to the plaintiff; and the cause of action in the present suit is different, arising from an order passed on a different claim case. That being so, we think the present suit is not for the same matter as that for which the former suit was brought. It may be quite true that the main issue to be tried in the present suit is the same as that which was the main issue to the former suit, but that would not make the present suit one for the same matter as that for which the former suit was brought. If the former suit had been heard and determined, and if section 13 was in consequence applicable to this suit, such an issue tried in the former suit might have operated as *res judicata* in the present suit; but that is not the case here.

Then as to the second contention, the evidence objected to as being inadmissible against the defendant-appellant is a recital in a *kobala* in favour of the defendant, under which he alleges he has acquired title to the property in dispute; and that recital is an

admission by the defendant's vendor that the property in dispute had previously been conveyed by him to the plaintiff's judgment-debtor. That being so, we think it is clearly admissible in evidence against the defendant.

1893

KAMINI KANT ROY v. RAM NATH CHUCKERBUTTY.

The objections urged before us therefore both fail, and this appeal must accordingly be dismissed with costs.

Appeal dismissed.

C. S.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Norris.

SITAL HARI BANERJEE (PLAINTIFF) *v.* HEERA LAL CHATTERJEE (DEFENDANT).*

1894 *January* 9.

Civil Procedure Code (Act XIV of 1882), *ss.* 108 *and* 157—*Ex-parte decree—Presidency Small Cause Court Act (XV of* 1882), *s.* 37—*Limitation Act (XV of* 1877), *Schedule II, Art.* 164—*New trial.*

There is a distinction made by the Code of Civil Procedure between cases decided *ex-parte* in the absence of one of the parties after first hearing, and cases decided in the absence of one of the parties at an adjourned hearing.

Chapter VII of the Code relates to the appearance of parties and the consequence of their non-appearance at first hearings, whereas Chapter XIII, of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment after the first hearing.

Where, therefore, a defendant put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date the case was heard in his absence and a decree given against him, *held*, that such a decree was not one made *ex-parte* so as to enable the defendant to obtain the benefit of s. 108 of the Code, but that his only remedy was under section 37 of Act XV of 1882.

REFERENCE from the Court of Small Causes as to whether a certain decree, made on the 30th June 1893 by the Officiating Second Judge of the Small Cause Court, was an *ex-parte* decree within the meaning of section 108 of the Code of Civil Procedure,

* Reference No. 6 of 1893, made in suit No. 1654 of 1893, by E. W. Ormond, Esq., Officiating Second Judge of the Calcutta Court of Small Causes.

1894

SITAI HARI BANERJEE v. HEERA LAL CHATTERJEE.

and of Article 164, Schedule II of the Limitation Act, so as to admit of an application for a new trial being made at a later date than it could otherwise be made under section 37 of Act XV of 1882, which prescribes eight days from the date of such decree to be the limit for such an application.

It appeared that the summons in this case was returnable on the 27th April 1893, on which day both the plaintiff and defendant appeared, the defendant by his pleader recording his pleas, and the case being adjourned, at the request of the defendant, for hearing to the 23rd June, and subsequently to the 30th June. On this latter date the defendant failed to attend, and judgment was given in favour of the plaintiff.

Later on in the same day the defendant's attorney appeared and applied, under section 108 of the Civil Procedure Code, to have the decree passed in his absence set aside, on the ground that he had made a *bonâ fide* mistake as to the date of the hearing.

Notice being served on the plaintiff, the application came on for hearing on the 14th July, when the learned Officiating Second Judge passed an order setting aside the decree of the 30th June and granted a new trial.

On the 18th July the plaintiff applied, under section 37 of Act XV of 1882, to set aside the order of the 14th July, which application, after notice, came on for hearing before the learned Chief Judge and the Officiating Second Judges on the 9th August 1893, the Court holding that the defendant's application of the 30th June should have been rejected, on the ground that it had not been signed by the applicant, as required by section 37 of Act XV of 1882; the learned Chief Judge intimating in his judgment that the defendant's application should have been made under section 37, Act XV of 1882, and not section 108 of Act XIV of 1882, inasmuch as the defendant had entered appearance in the suit. The decree therefore passed in favour of the plaintiff on the 30th June was restored.

On the 11th August the defendant (no process for execution having issued) again applied to the learned Officiating Second Judge, under section 108 of the Code of Civil Procedure, to have the decree of the 30th June set aside and a new trial granted. On the

6th September, after hearing both sides, that learned Judge, being of opinion that the decree of the 30th June was one made *ex-parte*, granted the application, but being aware that the learned Chief Judge held a different opinion, he made his order contingent on the opinion of the High Court as to whether the decree was one made *ex-parte* within the meaning of section 108 of the Code of Civil Procedure and Article 164 of Schedule II of the Limitation Act.

The referring order concluded as follows:—"My reasons for thinking that the said decree of the 30th June is an *ex-parte* decree are as follows:—Chapter VII of the Civil Procedure Code seems to contemplate two days only, namely, the day fixed in the summons for the defendant to appear and answer and (if any) the subsequent day fixed for the hearing (see the wording of sections 96 and 101). Section 156 allows the hearing to be adjourned from time to time, and section 157 lays down the procedure to be followed on any day of the hearing when either or both parties fail to appear. Therefore sections 157 and 100 together allow the Court to proceed with the case *ex-parte* in the absence of the defendant on any day of the hearing. If this is so, the whole of the hearing of this suit being *ex-parte*, the decree must be *ex-parte*. Section 119 of Act VIII of 1859 and the case of *Zainulabdin Khan* v. *Ahmed Raza Khan* (1) show that there can be *ex-parte* decrees, although the defendant may have appeared in the suit. I would also refer to the cases of *Doyal Mistree* v. *Kupoor Chund* (2) and *Ramtahal Ram* v. *Rameshar Ram* (3), and to the notes to section 109 on page 131 of Mr. Justice O'Kinealy's Code of Civil Procedure.

Mr. *Pugh* for the plaintiff:—I contend that even if the decree is *ex-parte* within the meaning of section 108 of the Code, yet the application should have been made within eight days from the decree in accordance with section 37 of the Small Cause Court Act. Having regard to the manner in which portions of the Civil Procedure Code have been extended by section 23 of Act XV of 1882, I say that section 108 does not apply; and having

(1) I. L. R., 2 All., 67; L. R., 5I. A., 233.
(2) I. L. R., 4 Calc., 318.
(3) I. L. R., 8 All., 140.

1894

SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE.

regard to section 37, I contend the Limitation Act does not apply; no provision of the Civil Procedure Code would bring in by implication the Limitation Act, as is clear from section 6 of the Limitation Act. Section 37 applies to all decrees, whether *ex-parte* or not. Section 157 of Act XIV of 1882 shows the mode of procedure under Chapter VII, but under section 158 there is a special provision, as to which see *Venkatachalam* v. *Mahalakshmamma* (1), *Shaik Saheb* v. *Mahomed* (2). This is not an *ex-parte* decree; see *Zainulabdin Khan* v. *Ahmed Raza Khan* (3), and *Ramchandra Pandurang Naik* v. *Madhav Purushottam Naik* (4); but see *contra Dhan Bhagut* v. *Ramessur Dutt Singh* (5).

Mr. *Zorab* for the defendant:—I contend that this is an *ex-parte* decree, and section 37 of Act XV of 1882 does not apply to such decrees; and that the limitation applicable is one month from the issue of process of execution. The Madras cases have no application, as they were under section 158 of the Code. Section 23 of Act XV of 1882 embodies section 108 of the Code, and therefore the Limitation Act applies. Section 108 is especially referred to in rule 44 of the Small Cause Court Practice. The Limitation Act provides a longer period for *ex-parte* decrees than for other decrees. See in the Mofussil Small Cause Act and in Act X of 1877; this principle has been therefore recognised by the Legislature, and I say that it ought to be implied when construing section 37 by holding that it only applies to contested cases.

As to whether this is an *ex-parte* decree, see *Ramtahal Ram* v. *Rameshar Ram* (6), and *Doyal Mistree* v. *Kupoor Chund* (7).

This case ought not to have been referred, as the learned Judge had "no reasonable doubt" as to his decision; see section 617 of the Code.

The opinion of the Court was delivered by

PRINSEP, J. (PETHERAM, C.J., and NORRIS, J., concurring):—This is a reference made by the Second Judge of the Small Cause

(1) I. L. R., 10 Mad., 272.
(2) I. L. R., 13 Mad., 510.
(3) I. L. R., 2 All., 67; L. R., 5 I. A., 233.
(4) I. L. R., 16 Bom., 23.
(5) 20 W. R., 53.
(6) I. L. R., 8 All., 140.
(7) I. L. R., 4 Calc., 318.

Court of Calcutta, under section 617, Code of Civil Procedure. In a suit before that Court the defendant appeared, and on his application the trial was adjourned. It is unnecessary to describe the course of the suit further than to state that on the 30th of June, when the case was fixed for trial, the defendant did not appear, and that after witnesses had been examined on behalf of the plaintiff, the claim was decreed. The point now referred to us is whether, on the application of the defendant, this matter can be dealt with under section 108 of the Code, so as to set aside the decree passed on the 30th of June as an *ex-parte* decree and to proceed with the trial. Objection might be taken to the manner in which this reference has been made. It is sufficient to say that no objection was pressed before us, and consequently we are prepared to express our opinion on the case submitted.

The order of the Judge was undoubtedly passed under section 157 of the Code, for, on the date to which the hearing of the suit was adjourned, the defendant "failed to appear" and "the Court proceeded to dispose of the suit in one of the modes directed on that behalf by Chapter VII of the Code," that is, by an order under section 100 giving the plaintiff a decree on the evidence tendered by him. The only question is whether, by reason of the Judge proceeding to dispose of the case under section 100, the defendant is entitled to the benefit of section 108 in the manner provided for decrees passed *ex-parte* against such a party. I am of opinion that the reference to Chapter VII, made in section 157, does not alter the character of the case so as to make an order passed in the absence of the defendant an *ex-parte* decree, and thus to enable the defendant to obtain the benefit of section 108. The reference to Chapter VII seems to me merely to indicate the procedure of the Court, and not to give a defendant the privilege to which he is entitled if the suit was decided *ex-parte* strictly within the terms of section 100. There is a distinction made by the Code between cases decided *ex-parte* in the absence of one of the parties at the first hearing and cases decided in the absence of one of the parties at an adjourned hearing. Chapter VII relates to the appearance of parties and the consequence of their non-appearance at the first hearing, whereas Chapter XIII, of which section 157 forms a part, contains the procedure for the trial of a suit on an adjournment

1894

SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE.

after the first hearing. In this suit the defendant did make an appearance at the first hearing, and therefore Chapter VII would not apply, except in so far as section 157 provides that the Court may exercise a discretion in disposing of the suit as directed in Chapter VII, should the defendant fail to appear on the day to which the trial may have been adjourned. The case of *Zainulabdin Khan* v. *Ahmad Raza Khan* (1), decided by their Lordships of the Privy Council, points out the distinction between a case decided *ex-parte* in the absence of one of the parties at the first hearing and a case like that before us decided in the absence of a defendant on the date to which the hearing of the suit may have been adjourned. The only remedy for a defendant in such a case is, as pointed out by their Lordships, by an appeal, should an appeal lie from a decree in the suit or, it may be added, as in the present suit, where no appeal lies from a decree of the Small Cause Court of Calcutta, by an application for a new trial under section 37 of the Presidency Small Cause Court Act, 1882. I would therefore, in reply to the reference made, state that the application before the Judge under section 108 should be dismissed.

Attorney for the plaintiff : Babu *Kally Nath Mitter.*

Attorneys for the defendant : Messrs. *Orr, Robertson* and *Burton.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

1893 *Dec.* 22.

BIKRAMJIT TEWARI AND ANOTHER (DEFENDANTS Nos. 4 AND 5) *v.* DURGA DYAL TEWARI (PLAINTIFF) AND OTHERS (DEFENDANTS Nos. 1 TO 3).*

Interest—Interest Act XXXII of 1839—*Interest on mortgage money—Transfer of Property Act (IV of* 1882), *s.* 88—*Charge on mortgaged property—Interest where none is stipulated for after due date of mortgage.*

The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage money, as it is money payable at a certain time, and

* Appeal from Appellate Decree No. 727 of 1892, against the decree of J. G. Charles, Esq., District Judge of Shahabad, dated the 15th of December 1891, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that district, dated the 23rd of December 1890.

(1) I. L. R., 2 All., 67 ; L. R., 5 I A., 233.

under a written instrument: and the terms of section 88 of the Transfer of Property Act make such interest recoverable or payable out of the mortgaged property. The interest on the mortgage is not necessarily only the interest which the parties stipulated by the mortgage deed should be paid, but would also include interest which under the law is payable, *e.g.*, interest after the due date of the mortgage, where there is no stipulation for interest after the due date.

THIS was a suit to recover Rs. 40,61-6 annas, being the amount due for principal and interest on two mortgage bonds, dated respectively 24th February 1882, for Rs. 649, and 18th August 1882, for Rs. 799, by which certain immoveable property was pledged for repayment of the money. In both deeds it was provided that the interest should be at the rate of Re. 1 annas 14 per cent. *per mensem*, and the date for repayment of the money was the 30th Joisto 1891 (11th June 1884). The plaint prayed that the amount might be realized by sale of the mortgaged properties, and also for a personal decree against the defendants.

The defendants 1 to 3, the mortgagors, did not appear. The defendants 4 and 5, who defended the suit, were subsequent mortgagees and transferees, and they raised several objections, the only one material to this report being that embodied in the first and fourth issues—(1) "Is the plaintiff entitled to any interest after due date, and if so, at what rate? (4) What is the amount due to the plaintiff, and how is it to be realized?" As to the first issue there was no express stipulation in either bond for interest after the due date of the bond. In the bond dated 18th August 1882, there was a stipulation that the mortgagees "shall not have a right to claim abatement on the interest, nor shall the *mohajan* be entitled to claim enhancement of interest either by our or his own motion, or by moving a competent Court."

The first Court, the Subordinate Judge, on this question observed:—

"As regards the first issue, I am to say that the bonds do not expressly stipulate for payment of interest after due date. In one bond, for Rs. 799, there is a stipulation that the parties will not increase or decrease the stipulated rate, but there is no provision that this clause refers to the period after due date. It might be construed to have reference up to that date. Considering the period during which the plaintiff was silent, and also considering the stipulation for high rate of interest up to due date, and also

1893

BIKRAMJIT TEWARI v. DURGA DYAL TEWARI.

taking into consideration the want of express stipulation for interest afterwards, I cannot allow to plaintiff the stipulated rate of interest after due date to date of suit. There is also no stipulation of interest after due date in the other bond. Consequently I allow interest at 6 per cent. per annum after such date, as fair measure of damages for defendants' non-payment of the money on that date. The first issue is found for the defendants."

The Subordinate Judge made a decree for the amount due on the bonds with interest at 6 per cent. per annum, the amount to be realized from the mortgaged properties in case the money was not paid within six months; also for a general decree if any amount remained unsatisfied by sale of the properties.

On appeal the Judge said:—

"I concur with the opinion of the Subordinate Judge that neither of the bonds relied on by the plaintiff stipulate for interest after due date, so that allowing interest is in the discretion of the Court. Considering that the plaintiff did not bring this suit till some six or seven years after due date, I think the Subordinate Judge exercised a wise discretion in allowing only 6 per cent. per annum as the rate of interest after due date."

The appeal on this point being dismissed, the defendants appealed to the High Court, on the grounds (*inter alia*) that the Courts below were wrong in allowing interest after due date, inasmuch as there was no stipulation in the bonds for payment of interest after due date; that the Courts below should not have awarded interest at six per cent., as a fair measure of damages for non-payment of the money on that date, inasmuch as the plaintiff's claim for such interest or damages was barred by limitation; and that such compensation or damages in lieu of interest should not have been made a charge on the lands in dispute.

Moulvie *Mahomed Yusoof* and Babu *Jagat Chandra Banerjee* for the appellants.

Babu *Abinash Chandra Banerjee* for the respondents.

The cases of *Juala Prasad* v. *Khuman Singh* (1), *Gobind Prasad* v. *Chandar Sekhar* (2), *Gudri Koer* v. *Bhoobaneswari Coomar Singh* (3), and *Golam Abas* v. *Mahomed Jaffer* (4), were cited in the course of argument.

(1) I. L. R., 2 All., 617.
(2) I. L. R., 8 All., 486.
(3) I. L. R., 19 Calc., 19.
(4) I. L. R., 19 Calc., 23, note.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.), so far as it was material to this report, was as follows:—

The second point is a question of interest. The appellants are the assignees of the mortgagors, and they complain that the interest from the due date of the bond up to the date of suit has been charged on the property. They say that, inasmuch as under the terms of the bond no such interest is payable, it can only be treated as damages, and cannot be charged on the property, and we have been referred to two judgments of the Allahabad High Court (1), in which, relying upon certain English decisions, what is called damages are given in respect of the loss after the time when the money was stipulated to be paid. It really seems to us that it makes very little difference what we call it. In the ordinary acceptation of the term, money of this class is generally known as interest. But apart from other questions, we feel a difficulty in making any use of the Allahabad decisions, because it does not appear that the Interest Act was in the contemplation of the learned Judges who gave those decisions. The Interest Act is not mentioned by them, and as happens, we are sorry to say, very frequently in reports of cases tried in Indian Courts, there is no reference at all to the arguments of pleaders or other legal representatives of the parties, and no statement of the statutes or cases cited. We have frequently had to point out that, in the absence of a detail of the arguments and of the Acts cited in respect of a decision, that decision is of very much less value than it would otherwise be. In our opinion, under the Interest Act, which is Act XXXII of 1839, the Court has power to give interest upon mortgage money, as it is money payable at a certain time and under a written instrument. That Act, as we have said, was not referred to in either of the judgments in the Allahabad cases; and there being that power in the Court under that Act to give interest upon mortgage money, we think that the terms of section 88 of the Transfer of Property Act make the interest recoverable or payable out of the property. That section says:—"In a suit for sale if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86," that is

(1) I. L. R., 2 All., 617, and I. L. R., 8 All., 486.

1893

BIKRAMJIT TEWARI v. DURGA DYAL TEWARI.

to say, "ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to." We think the interest on the mortgage is not necessarily only the interest which the parties by the mortgage stipulated should be paid, but would also include interest which under the law is payable. The words are wide enough to bear such a construction, and in our opinion it is reasonable, and as far as we know it has been the practice of the Courts to allow in the account taken under a mortgage a reasonable rate of interest after the time stipulated for payment until the date of the final order for sale. At any rate, whether it has been the practice of the Courts or not, the construction of the section which the learned District Judge has accepted and acted upon is in our opinion reasonable.

We are obliged to the learned pleader for the appellants for citing to us a recent decision of this Court in *Gudri Koer* v. *Bhoobaneswari Coomar Singh* (1), and also another case of this Court, *Golam Abas* v. *Mahomed Jaffer* (2). In the first place we find the learned Judges have expressly, at page 24 of volume 19, I. L. R., Calcutta Series, declined to decide the question which we are now deciding; and in the *second place*, the only question in those cases was the question of limitation—a question which is entirely different from that which is now before us. In our opinion, in this case the interest is recoverable from the property in the same way as the mortgage money and the costs of the suit, as well as the interest which the law allows to be charged; and therefore we hold that the lower Appellate Court is right.

The third question was barely argued by the learned pleader. It was with reference to the power of the mortgagor to mortgage the property. As his clients were the assignees of the mortgagor, we do not see how he could have argued it on their behalf.

The result is that the appeal must be dismissed with costs.

Appeal dismissed.

J. V. W.

(1) I. L. R., 19 Calc., 19. (2) I. L. R., 19 Calc., 23, note.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

WOOMESH CHUNDER BISWAS (DEFENDANT) *v.* RASHMOHINI DASSI (PLAINTIFF).*

1893 *Aug.* 9.

Will—Execution of will—Proof of due execution of will where the mental capacity of testator is in dispute—Rules for decision of such cases—Presumption—Duty of Appellate Court in deciding on evidence of witnesses.

In all cases in which the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value where there is conflict between them as to the mental capacity of a person whose conduct they have observed, and whose state of mind they depose to: for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, *viz.*, power of observation, power of judgment, accuracy of expression, and general intelligence, which are of special importance in cases where the execution of a will is disputed on the ground that at the time the will was alleged to have been made, the mental capacity of the testator was such that it was doubtful whether the will could have been "duly executed."

"Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorizing, the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions.

In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved of the contents of the will. Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption: ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence, which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have "duly executed" the will as he is alleged to have done, the Court ought to

* Appeal from Original Decree No. 287 of 1891, against the judgment of Koomar Gopendra Krishna Deb, Officiating Judge of Nuddea, dated the 10th of August 1891, and the decree dated the 31st August 1891.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will.

Where this had not been done, the Appellate Court after considering the whole evidence held, contrary to the decision of the Lower Court, that the will was not proved and refused probate.

THE facts of this case and the evidence are sufficiently stated in the judgment.

Mr. *Jackson*, Babu *Lal Mohan Das*, and Moulvie *Mahomed Habibulla* for the appellant.

Babu *Srinath Das* and Babu *Saroda Charan Mitter* for the respondent.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

This is an appeal from an order of the District Judge of Nuddea directing that probate be granted of the will, dated the 25th Falgoon 1297 (8th March 1891), of Mohim Chunder Biswas of Bhabanipore, thanah Meherpore of that district.

Mohim died on Cheyt 5th, 1297 (or March 18th 1891). The application for probate was made by Rashmohini Dassi, his widow, and Khettra Nath Chowdhry, who were named as executrix and executor in the document propounded as the will. It was filed on the 5th May 1891. Three other persons named therein as executors did not join in the petition for probate, and a few days after that petition was filed, Khettra Nath filed a petition on May 18th renouncing the office of executor.

Mohim left one child, a minor daughter, by his wife Rashmohini, a sister and a nephew, his sister's son, about 3 or 4 years old. He left two paternal uncles surviving him, the elder Tara Chand, an old man of about 80 years of age; the younger is Woomesh Chunder Biswas, the caveator, with whom, according to the evidence, Mohim was on bad terms, although Woomesh and some of the members of his family visited Mohim during the illness of which he died, up to near the time of his death.

The will is in 12 paragraphs, and shortly provides as follows:—(1) power is given to the wife to adopt sons from one up to two; (2) four executors and Rashmohini as executrix are appointed. They are to make over to the son who may be

adopted by Rashmohini, the property that is to go to him when he arrives at majority, and to the daughter's son on his attaining majority, the property that is to go to him; (3) Mohim's daughter is to be married with customary display to be paid for out of income; (4) his sister, and after her death her son, is to receive Rs. 300 from the income annually; (5) his father and mother-in-law are to receive Rs. 5 per mensem; (6) of his moveable and immoveable properties which he has, and which he may hereafter obtain, or may obtain under the will of his uncle Tara Chand, one-half, except his dwelling-house at Bhabanipore, is to vest in his daughter and her son or sons, the other half in the adopted son, if any be adopted; (7) if no son be adopted, or the adopted son, &c., should die, then his share is to vest in the daughter and daughter's children; in the absence of daughter and daughter's children their share is to vest in the adopted son, if any; in the absence of either, the entire estate is to vest in his wife, and in the absence of his wife, in his nephew, or any full brother he may have. (8) Gives a provision of Rs. 600 annually for his wife for the performance of her religious observances, and also maintenance for her; (9) states circumstances connected with a dispute between Mohim and his uncle Woomesh, states certain terms already settled by a pending arbitration, and directs the executors to carry out the arbitration; (10) provides that the wife is to use the house at Bhabanipore which is to go ultimately to the adopted son; (11) makes a provision of Rs. 300 for the marriage of his cousin Biprodas Biswas; and paragraph 12 is as follows:—"My hands are paralysed. I am unable to sign this will myself. I have read through all the terms of the will, and I have in sound mind signified my acceptance of them in the presence of witnesses and have had my name signed by the pen of Trailakha Nath Biswas, the scribe. This is admitted by me. Dated the 25th Falgoon 1297 B S."

The will, therefore, *first*, gives to Rashmohini, who propounds it, a more limited immediate interest than she would have on an intestacy; *second*, makes provision for an adoption which it would be natural that Mohim should be anxious to do; *third*, and thereby as well as by its other provisions, wholly excludes Woomesh from all hope of succession.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

Khettra Nath, who was cousin and manager and trusted adviser of Mohim, and who, according to the plaintiff's case, was the person who was active in attending to the preparation of the will and in carrying out the arrangements for the execution of it, takes nothing under the will. He was made executor, but renounced before caveat was entered.

The petition for probate was filed on the 5th May 1891; on June 11th the caveat in the case was filed by Woomesh.

Mohim was about 29 years of age. He was, according to Khettra Nath, a very intelligent man, a statement which was not denied. The grounds on which the will is disputed arise chiefly out of the circumstances and nature of the illness of which he died.

On the 12th Magh (24th January) preceding the date of the will, Mohim had an attack of paralysis, his right side became paralysed. On the 12th Falgoon his illness increased. On the 19th Falgoon, he had another fit. On the next day, Dr. Bepin Behari Chatterjee, an M.B. of the University of Calcutta, and one Jasoda Koomar Dutt, a native doctor (both of whom are witnesses for the defence), were called in to attend him.

The medical evidence for the defence is to the effect that Mohim was suffering from some "syphilitic deposit in the brain, known among doctors as *guminata*." The plaintiff's medical evidence seems rather to agree with this diagnosis. The words are those of the witness. Perhaps by "deposit" he means "tumour."

After the fit on the 19th it was resolved to remove Mohim to Calcutta for treatment. Khettra Nath says that Mohim himself proposed this on the 20th. Some of the defendant's witnesses seem to put it as having been suggested after this, some two or three days before the 26th of Falgoon. The 26th was certainly the day fixed for the removal.

Dr. Bepin says he was opposed to the removal, the reason which he assigns for this being that the condition of the brain was such (the whole of the brain being diseased) that if the patient received any shock the probability was that he would get apoplexy. If he then entertained this apprehension, what took place showed that it was well founded.

On the 26th the attempt to remove the patient was made, and on that day, while he was being assisted or actually carried [as to

which the evidence is conflicting] from his room for this purpose, he had another fit, after which the intention to remove him had to be abandoned. From that time he had little, if any, consciousness; and he died on the 5th Choitro (March 18th).

The will is said to have been made on the 25th Falgoon, the day before the attempted removal.

The Lower Court found in favour of the will. The caveator Woomesh appeals. An objection was taken before us that he had no interest such as to entitle him to come in and dispute the will, but this point not having been taken in the Court below, we decline to entertain it.

The chief ground of argument in appeal related to the capacity of the alleged testator, supposing the form of execution of the will to have been gone through as alleged.

But besides the questions raised as to this, it was also contended that the whole transaction was surrounded with circumstances of secrecy, and of other grounds of suspicion, such as to cast doubt upon the whole story as to any execution at all such as alleged by the plaintiff, or at any rate such as to confirm any doubt of Mohim's testamentary capacity which might arise on the evidence; as indicating that those who put forward the will ultimately, did not believe that it was duly executed.

It will be necessary to refer at some length to the subject of testamentary capacity, even before deciding the question raised in the case, and in doing so to refer to some of the evidence; so that it will be convenient to refer to those points of suspicion later on, after some of the evidence has been touched on.

In argument before us it was contended for the appellant that the plaintiff was bound to show that Mohim was of sound and disposing mind at the date of the will, and that she had failed to show this; and further that, upon the whole evidence, not merely was there an absence of sufficient proof that he was of testamentary capacity, but the evidence actually showed that he was not capable of making a will at the time the alleged will is said to have been made.

In all cases in which, as in the present, the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value, where there is conflict between them as to the mental capacity of a person whose conduct they have observed and whose state of mind they depose to; for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence, from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, power of observation, of judgment, accuracy of expression, general intelligence, which are of special importance in cases of this nature.

One of the most serious difficulties in this difficult case arises from the limited scope of the issue as to testamentary capacity to which [as there is much reason to think] the Judge appears to have directed his attention, and which upon the conflict of evidence he decided in favour of the plaintiff.

It is necessary, in order to explain this, to refer shortly to the general scope of the story told by each side.

The plaintiff's story includes, *first*, what was done about the will before its execution; *second*, the narrative as to the execution of the will; *third*, statements as to the condition of Mohim before and at the time of execution, but chiefly as to his condition at that time. So far as it is necessary for the present purpose to refer to it, it may be taken from Khettra Nath's and Rakhal Dass's evidence; through Khettra Nath everything was done, and it is he who conducts the plaintiff's case. According to the evidence of Khettra Nath, the arrangements connected with the preparation and execution of the will were carried out by him in consultation with Mohim and with his authority. He says that the propriety of Mohim's making a will, having regard to his illness, was mentioned by some of his friends before the 20th Falgoon; it was not, however, until that day, after the second fit, that the preparations for the will were commenced. He says that Dr. Bepin said on that day, considering Mohim's state, there should be a will made. He says he told Mohim this; that Mohim said, "Let a will be made, then I shall go to Calcutta;" that he and Mohim

consulted that night; that on the 21st or 22nd he made a draft, which Mohim saw on the morning of the 23rd, and directed that it should be sent to be revised by Abinash Babu, the pleader at Meherpore; that he sent it to the pleader on the 24th by Tarak Nath (a witness in the case); that the pleader returned it by Tarak Nath on the same day; that on that night the draft was made by Mohim, and on the following day this draft was copied out in Mohim's presence by Trailakha Nath, the scribe [a blank for the name of the scribe had been left in the draft]; that the copy to made was signed for Mohim by Trailakha Nath as his will, and by his directions, and was then at Mohim's request attested by the persons whose names appear as witnesses.

Part of the evidence of Khettra Nath in direct and cross-examination is as follows:—"I was present at the time of the execution of the will. The will was executed on the 25th Falgoon. I think it was executed 4 dandas before sunset. The will was executed in the house in which he (Mohim) used to sleep. Trailakha Nath Biswas wrote out the will from a draft. * * * * Mohim saw the draft on the night of the 24th and he saw the original will on the next day. He read them. The draft he read in the night and the fair copy on the next day. Mohim requested Trailakha to sit in his room and write out the will. After fairing it out, he handed it over to Mohim, who said, 'I will touch the pen, you write my name.' Trailakha wrote his name accordingly. Mohim said to Shama Churn, who was among the witnesses present, 'Take it, and do all of you witness it.' First Trailakha made the signature, then he gave the will to Mohim, and he handed it over to Shama Churn, who read it out in the hearing of all the people. After that he signed it himself, and the others signed after him. Pran Chand, Tarak Nath, Mothura Nath, Rakhal Dass, Bhushun Chunder, Sree Nath, and Dino Nath signed as witnesses. This is that will. This is the signature of Mohim which Trailakha wrote, and all these are the signatures of the witnesses. The witnesses signed their names in the presence of Mohim. The place where the witnesses signed their names was close to Mohim. When Mohim's name was written, the witnesses were present. * * Mohim touched the pen. Dino Nath Biswas gave the will to Mohim, after that Mohim gave me

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

the will to keep. He was in full possession of his senses at the time. I put the will away in my own hand-box. Woomesh Biswas is my maternal uncle and Mohim's paternal uncle. Mohim had disputes about shares with him. * * * After Mohim's death, I made known the fact of the will having been made. He forbade us to make known the fact of the will having been made before his death. He forbade it that his uncle (*jetha*) might not know he was going to die, and that his enemies might not know about the will."

In cross-examination he says :—" It took 10 or 12 minutes to read Mohim's will. That was on the night of the 24th. He read it to himself. He read it in a low voice. He did not ask to have any alterations made; it had been well drawn up. He lay on his right side in the night. He sat up on the next day, the 25th, and read the will. He could not write with his left hand. He could do other things. He could take his food and move articles about. He could hold the pen. We did not ask him to put a mark with the left hand, nor did we ask him to try and sign. Mohim asked all the people to witness the deed; all of them were not (his) servants. Shama Churn Biswas and Rakhal doctor were not (his) servants. Shama Churn is my brother-in-law. * * I think Rakhal and Shama Churn came to the assembly where the will was executed, 10 or 15 minutes before it was signed. I called and fetched them. I also called and fetched others from the cutchery. Our cutchery adjoins Woomesh's cutchery. * * * I was careful that neither Woomesh nor his sons, nor anybody else, shou'd know. I placed one Mohesh Ghose outside, and told him to apprise me if they wanted to come in. This I think I did 5 or 6 minutes before I called the witnesses. I only went once out of the assembly where the will was executed. Mohesh Ghose was close to the door of the room. He was coming to our room. I sent him away, asking him to see that the other party did not come. He did not ask what was going on. There were 8."

It may be convenient to add a part of the evidence of Rakhal Dass, a physician who had attended Mohim before Dr. Bepin; and who is a witness of the will: "Again I was called on the 25th Falgoon. Ram Churn told me a letter had been received from Bhabanipur [Mohim's residence]. Hence I and Ram Churn

Pran Chand and Srinath started at 1-30 or 2 o'clock on the 25th Falgoon. We arrived at Mohim's house at 3 or 3-30 o'clock. After getting there we sat down in the verandah of the cutcherry. Khettra Chowdhry himself invited us in. I and Pran Chand, Khettra, Srinath, Mathura Biswas, and Dino Biswas went in and found Mohim lying down in a side room. I went and sat down on a chair near him. After taking my seat, I asked, 'How are you?' He replied, 'I am somewhat better to-day.' Then I felt his pulse. Other conversation about the going to Calcutta for the purpose of medical treatment took place. He said, 'You will have to go with me.' It was settled that we were to go within two dandas of the next day. Shama Churn, Mohim, Khettra Nath, servants and I—these persons were to go to Calcutta. Those words were understood. There was distinctness. Some words I could understand after asking him two or three times. He had had a paralytic stroke; his right side was paralysed. Khettra said 'Mohim will go to Calcutta to-morrow, and he has made a will.' Trailakha put a paper on Mohim's bed. Khettra said, 'Raise Mohim and make him sit up.' He got up and sat. Bhushun made him sit up supported by a pillow. He read that paper. He held the paper in his left hand, and looked at it, and then requested Shama Babu to witness it. Shama Babu read it. After that Mohim requested Trailakha to write his (Mohim's) name. Trailakha wrote the name, standing by Mohim's side. Mohim could see it. Mohim then looked at the signature of his name. After that he said, 'Do you people sign your names as witnesses.' I also signed my name. This is that will. This is my signature. This is Mohim's name written. Mohim saw the witnesses signing their names from close. Mohim was in possession of his senses. Hearing him speak I thought his mind was in a good enough condition to make a will."

Trailakha Nath's evidence is to the same effect. He does not witness the will. Besides Rakhal Dass, six of the other witnesses of the will are called, who give general evidence (some with particulars also) of Mohim's being in a condition to "make a will," although no doubt affected by his illness in respect of distinctness of speech and otherwise.

For the defence, Dr. Bepin and Jasoda, already mentioned, and also Woomesh the caveator, Hurrinath a gomasta, Paran

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

Krishna Gangopaddhya and Nobin Chundra, servants of Woomesh, give evidence which is generally to the effect that Mohim was in such a state that he could not have made a will. They describe him as having been, when they saw him, in a state of almost complete apathy or stupor, from the time of the fit on the 19th up to the 25th, and unable to "make a will."

This evidence, particularly, of course, that of the two doctors, relates to the whole of the six days; but it is hardly going too far to say that, so far as it describes what the witnesses allege as to the period before and including the 25th, it is pointed chiefly, if not wholly, to Mohim's state on that day, as leading up to it, and as tending to show that on that day Mohim could not "make a will."

This is the compendious expression used, as to Mohim's condition, by the witnesses on both sides, and by the Judge, and it is the use of it by them and by him, in the meaning which it is to be feared he attached to it, which constitutes a difficulty (we have to deal with) as affecting the value of the Judge's opinion upon the conflict of evidence in the case, so far as regards some of the questions which necessarily arise. The objections taken in the caveat are—

1. The caveator does not admit that the will was duly and actually executed.

2. The alleged testator was in such a state of body and mind on the date borne by the will that it was quite impossible for him to have executed any will.

3. Many false statements are made in the will filed, and it is quite impossible that the late Mohim Chundra Biswas should have executed such a will in his senses and in a sound state of mind.

Nothing was made of this last point at the trial, so far as appears. Had it been pressed it might have led the defendant [however inadvertently] to go into the question whether Mohim was proved, or ought to be presumed, to have known and approved of the contents of the will; and in that case, we might have had something from the learned Judge on that subject, more definite than we can find in the judgment.

The Judge's summary of the questions raised by the caveat, and the issue framed by him, are as follows:—

"*Grounds of objection.*

"1. Denies due execution of the will.

"2. Denies physical and mental capacity to execute will on dates of alleged execution" [the word *dates* must mean *date*].

"3. Certain expressions in will which render execution improbable.

"*Issue.*

"Was the will duly executed by testator according to law?"

Now, no doubt this issue does raise all the questions which should be determined in the case, if the terms of it are properly understood. Dr. Lushington in delivering the judgment of the Judicial Committee in the case of *Mitchell* v. *Thomas* (1) says:—

"When I use the term 'duly executed,' I do not mean merely the technical sense of it, the fact of execution by the testator and the subscription of two witnesses as required by the Statute, but I mean by the term 'duly executed,' proof of execution which carries with it a conviction that the testator knew, and approved of, the contents of the instrument. This of course involves, in the proposition that the testator knew and approved of the contents of the instrument, the proposition that he was a free and capable testator, since knowledge implies his possession of the capacity without which he could not know the contents of the will, and approval cannot be real and complete without a free exercise of the will."

The judgment of the original Court is however chiefly, if not wholly, directed to the question whether on the 25th Mohim was in such a state of mind as to be able to authorize and to know that he was then authorizing the execution of the document as his will on his behalf, by Trailakha Nath, and the attestation of it by the witnesses. It was denied by the defendant that Mohim was in such a state of mind as to be capable of this. If he was not, the will was not executed at all. It was, of course, a vital issue in the case, and the Judge was bound to find on it. He decided it in favour of the will.

(1) 6 Moo. P. C., 150.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

But there was the other question which certainly arose on the evidence, though it seems not unlikely that it escaped the attention of the pleaders in the Court below, and on which the Judge did not, as he ought to have done in this case, definitely express his opinion. That question is whether Mohim was able to know and understand the contents of the will and did know and approve of them.

It does not matter whether such a question was or was not expressly raised by the defendant. It lay on the plaintiff to prove that the will was Mohim's will. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient if nothing appears to the contrary to establish) that he knew and approved the contents of the will. Also, under ordinary circumstances the competency of a testator will be presumed, if nothing appears to rebut the ordinary presumption. As the result of these two presumptions in ordinary cases, at least in many cases, proof of execution of the will is enough.

But where the mental capacity of the testator is challenged by such evidence as there is in the present case, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. There is evidence in the case which, if believed, is perhaps enough to establish this: but the Judge has not pronounced, or at any rate distinctly pronounced, his opinion upon it.

In consequence of this defect in the judgment, it is desirable in deciding this appeal to draw attention to some of the rulings which bear on this class of cases.

The first of the two rules laid down in *Barry* v. *Butlin* (1) is as follows:—"this *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." Later on at page 484 of the report, the judgment in that case lays down, "In all cases the *onus* is imposed on the party propounding a will; it is in general discharged by poof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed."

(1) 2 Moo. P. C., 482.

In *Cleare* v. *Cleare* (1) Lord Penzance says, "I hold it to be clear, since the careful decision in *Sutton* v. *Sadler* (2), that in all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator, must establish the fact that the testator was competent to make a will when he executed it. This competency forms part of the proposition that the will was made. For if there is no competency, no testable capacity, there can be no will. We are of opinion that the testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew and approved of the contents is a proposition implied in the assertion that a will was made by him. For if a man were to sign a paper of the contents of which he knew nothing, it would be no will; *Hastilow* v. *Stobie* (3). That the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds it as a will. This burden is satisfied *primâ facie* in the case of a competent testator by proving that he executed it. But if those who oppose it succeed, by a cross-examination of the witnesses, or otherwise, in meeting this *primâ facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate."

As to what constitutes a "sound and disposing mind." A "sound mind" is the expression used in section 46 of the Indian Succession Act. Illustration (A) to Explanation 4 of that section is framed on the law as long laid down in the English cases. It may be as well to refer to one or two cases on the subject, as in the present case it does not seem to have attracted the attention of the parties or of the Court. In *Harwood* v. *Baker* (4) the Judicial Committee says, "But their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also

(1) L. R., 1 P. and D., 657.
(2) 3 C. B. N. S. 87; 26 J. J. C. P., 284.
(3) L. R., 1 P. and D., 64.
(4) 3 Moo. P. C., 282 (290).

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in his property;" and later on their Lordships say, "The question * * * is not whether Mr. Baker knew when he was giving all his property to his wife and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property." If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question of his capacity."

This case is often cited as laying down the general test of capacity to be applied in such cases. It was greatly relied upon by the appellant before us It is to be observed that in *Harwood* v. *Baker*, a state of facts existed of a kind to invite the vigilant attention of the Court. The will was made by the testator on his deathbed, in favour of his wife to the exclusion of the other members of his family; the disposition in the will being a total departure from the previously expressed intentions of the testator, and he being of an impaired capacity at the time, from disease affecting the brain which produced torpor, and rendered his mind incapable of exertion unless roused. The will was executed five hours before the testator's death and two hours before he was found by his medical attendant in an unconscious and dying state.

A further passage in the judgment in this case will be referred to hereafter.

The general rule is thus laid down in *Longford* v. *Purdon* (1) by Warren J.—"A man is competent to make his will if he has sufficient memory and intelligence to be able to comprehend the nature of his property, to remember and understand the claims of relations and friends, and to have a judgment of his own in disposing of his property; * * if a man possesses this amount of

(1) Ir. R. Ch., 75 (77).

memory and intelligence, he is a competent testator; if he is not able to perform the mental acts mentioned, then he is not a competent testator."

In *Sefton* v. *Hopwood* (1) Cresswell J. said:—"It is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called 'a disposing mind'; he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will or a reasonable will, or a kind will. * * * But he must be able to understand his position, he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death; and if he has capacity for that it suffices."

Another case like the last (it was a case tried with a jury) is that of *Swinfen* v. *Swinfen* (2). It was an issue *devisavit vel non* sent by the Master of the Rolls. The marginal note may be taken as a sufficient summary of the facts of the case. "At the time of the will the testator was in extreme old age and in the last stage of bodily infirmity, bedridden, utterly helpless and dependent on the care of the plaintiff (sole devisee of the reality) and of a nurse (the only legatee) and a physician, an attesting witness and an intimate friend of the devisee, her own attorney (another witness) having prepared the will upon instructions elicited by himself from the testator by interrogatories, they having a few days before represented him as quite incapable of managing his own affairs or taking care of his person, and it being admitted that two or three days before he was not competent to make the will, &c., &c."

In charging the jury, Byles J. said, "The case for the defendant is that the testator's mind had been gradually decaying; it had become feeble and fatuous, so that at the time of the execution of the will, he was on that ground incompetent to make it; and that is the sole question in the case, whether he was upon the evidence competent.

"To constitute a good testamentary disposition the testator must retain a degree of understanding to comprehend what he is doing—

(1) 1 F. & F., 579. (2) 1 F. & F., 584.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

to have a volition or power of choice; so that what he does really be his own doing, and not the doing of anybody else.

"The faculties in those two great divisions, of the understanding and the will, must still exist. They have declined from their former comprehensiveness and vigour, they may be, and often are, on such occasions, weak and actually on the point of being extinguished; still though they may be as it were flickering in the socket, yet if they suffice to show the genuine and last behests of a rational creature, and a free agent, that is a good will in point of law. Wills are too frequently made by the sick and dying; the degree of understanding therefore which the law requires is such as may reasonably be expected from persons in that condition. It is not enough that a testator is able to answer familiar and usual questions. That has always been laid down. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes, and as to the general nature and general objects and the provisions which it contains; if he can do that, though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough."

These observations are of importance. They do not qualify, indeed, they state, the rule already stated in the cases above referred to, but they are important as illustrating the manner in which it is to be applied, in that multitude of cases in which the testator's mind has been in some measure debilitated by illness, and the weakness which often comes before death: and they were made in a case in which it is plain the learned Judge was himself of a different opinion from that which was adopted by the jury. The jury found for the will. Lord Romilly, M.R., refused an application for a new trial made on the ground that the verdict was against the weight of evidence, agreeing with the verdict arrived at: see *Swinfen* v. *Swinfen* (1).

In connection with this, reference may be made here to a second passage in the judgment in *Harwood* v. *Baker*(2), which we said we would notice. At the close of the judgment their Lordships say,

(1) 29 Beav., 148. (2) 3 Moo. P. C. 282 (313).

"Now, if their Lordships had found from the other evidence that Mr. Baker had, while in a state of health, compared and weighed the claims of his relations, and had formed the deliberate purpose of rejecting them all in favour of his wife, but had omitted to carry that purpose into effect before the attack of illness, under which he died; and that during that illness he had acted upon that previous intention, and executed the will in question, less evidence of the capacity to weigh those claims during his illness might have been sufficient to show that the will propounded really did contain the expression of the mind and will of the deceased;" and their Lordships then refer to the wholly different intentions entertained by the testator up to immediately before the execution of the alleged will, as casting the utmost doubt upon its containing Mr. Baker's real mind and will.

There is but one further quotation to make; it is from the judgment of Dr. Lushington in *Darnell* v. *Corfield* (1). After saying that he is not aware that the doctrine laid down in *Barry* v. *Butlin* (2) (the first proposition in which has above been here referred to) differs from that formerly acted on, namely, in substance that proof of knowledge of contents of the will may be given in any form, and that the degree of proof depends on the circumstances of the case, he says that although in perfect capacity knowledge of the contents may be inferred, yet when the capacity is impaired and the benefit to the drawer of the will is large (a circumstance not arising in the case of this will of Mohim's), suspicion is strong and proof must be most stringent, and the Court must be satisfied of proof of knowledge of the contents beyond the proof of execution by the testator. Add, he says, one ingredient—"the nature of the instrument executed, its simplicity or complexity, because when you are measuring the power of a weakened intellect the quality of the subject to which it is to be applied must always be an important test."

The Judge therefore ought, under the circumstances of this case, in which the ordinary presumption of full capacity cannot be made, to have expressed his belief upon the evidence as to whether Mohim being a capable testator, did or did not know and approve of the provisions of the will which he executed.

(1) 1 Rob. Eccl., 63. (2) 2 Moo. P.C. 482.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

It is necessary in deciding this appeal to deal with these questions: it is unfortunate that this must be done, without much assistance to be derived from any opinion formed by the learned Judge. The defendant's contention is, that the whole transaction of the alleged will was a pretence throughout: and he does not admit even that the assembly in Mohim's room at which the will is said to have been made, really met at all: or that the form of making a will, which at best is all that, as he says, could have taken place, was ever really gone through, as it would have been very difficult, if not impossible, that it should take place, without its being known either to Dr. Bepin or to Jasoda, or to Woomesh, and the members of his immediate family, whose cutchery and place of residence are next door, and who were visiting during Mohim's illness: also that it is negatived by some express evidence.

But I think that, on the whole, the statements of the plaintiff's witnesses that the assembly did take place cannot be rejected. No doubt a considerable time would be taken in copying out the document which it is said was done in Mohim's presence. But it was not until that was done, that Rakhal and Shama Churn and Mohim's cutcherry people were called in by Khettra to attest the will; after that the proceeding, according to the plaintiff's story, did not take very long, and during that time, according to Khettra, Mohesh Ghose was outside on the watch to prevent any interruption. There was secrecy, and probably haste, in what then took place, and the air of deliberation given to the proceedings in the evidence of some of the witnesses is probably colouring. But we think the meeting did take place, and the execution did take place; whether as a mere form and pretence or not is of course a different question.

Great stress was laid in the argument before us, on the secrecy with which the thing was done, and on the fact that Rashmohini, as was argued, was shown to have denied at first that any will had been made.

I think the fact that the intention to make the will was avowedly concealed from the members of Mohim's immediate family does cast suspicion on the transaction. Khettra says, Mohim did tell his wife and sister on the 24th and 25th Falgoon. He is

not corroborated by them: they ought to have been called to prove it, but for some reason or other no application to examine them was made until the plaintiff's case was closing. It was then refused as to the sister and granted as to the widow, with some limitation made in the order which will be afterwards referred to. In the result, there is no evidence from them that they were even told of the will by Mohim (nor, as will be noticed, any evidence from them as to Mohim's state of mind).

There was, therefore, complete secrecy, the persons made witnesses of the will being all servants of the cutchery of which Khettra then was, and now is, the manager, except Shama Churn Biswas, Khettra's brother-in-law, and Rakhal (the physician).

The truth is that the whole transaction was (except so far as Mohim himself was, if at all, concerned in it) carried out by Khettra. On him, almost alone, the proof of its validity must rest.

As has been observed, under the will, he takes nothing, and therefore the rule that a will made for a testator by one who takes a large interest under it is regarded with much jealousy, and requires the most conclusive proof, does not in terms strictly apply. Still this case does wear the aspect, looking at all the facts, of a struggle between Khettra and Woomesh in which the continuance of Khettra's management probably depends on the will: although no doubt Khettra, on pressure brought to bear on him, he says, by all the members of the family, including Woomesh, did renounce his executorship, he still preserves the management and carries on this case.

The reason assigned for the secrecy with which the will was made is that Mohim was anxious that Woomesh should continue his visits, still paid regularly by him, notwithstanding the quarrel. No doubt Mohim would naturally desire that such a mark of respect should continue to be paid him by so near a relative. On the other hand, if Mohim's condition was at all such as the defendant says it was, this secrecy might be explained by Khettra's knowledge that the family would protest against a will being made for him in his then state.

On the plaintiff's own case, Mohim's condition was obviously most serious, and having regard to this, and notwithstanding the

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

reason for secrecy which is set up, I think that a will made under such circumstances must be regarded with suspicion, or at any rate with a vigilance requiring very clear proof of the mental competence of the testator at the time. We think that upon the evidence it does appear that Rashmohini was prepared at one time to dispute the will. This fact does not, we think, carry the case very much further. People are often quite ready to raise questions of fact without much justification if their interests seem to require them to do so: and very possibly her objection as to the number of the executors appointed, which is mentioned by her uncle Ram Tarak (whom I see no reason to discredit), may have led her to resolve to oppose the will on any grounds she could set up. It does not weigh for much, still, so far as it goes, it tells against her knowing from Mohim that the will had been made, and perhaps against her belief that he could have made it; and is an additional, though not very strong, circumstance of suspicion in the case.

As to Mohim's condition during the days that elapsed between the 19th and the 25th and his condition on that day, the evidence for the plaintiff represents him as being able to speak, and even to converse; but this evidence is couched in that summary and unsatisfactory form which is of such frequent occurrence in our courts: and it is not for the most part sifted on this point in cross-examination.

We shall refer to the different statements of the witnesses, as to what they say he said, leaving aside Khettra Nath for the moment, whose evidence has been in part set out.

Trailakha Nath says:—"After writing out the will I handed it to Mohim for signature. He said, 'I shall not be able to write. Let me touch the pen; you sign my name.'"

Now, if this language were to be taken literally, we should take the witness to mean it to be understood that Mohim actually said this. But in our courts witnesses, at any rate uneducated ones, very often put in the form of a narrative of a conversation in actual words that which they wish to convey as the general effect of what happened. It is a form in which they often express themselves without meaning to decide.

Here Trailakha Nath had just copied out the will. In the 12th clause the testator says he was paralysed, unable to sign, and has had his name signed by Trailakha Nath, the scribe. The draft from which Trailakha Nath had just copied left a blank for the name of the scribe who might be employed; and this he has just filled up with his own name. We do not think the man can mean that he went through the empty form of asking Mohim to sign, and Mohim through that of solemnly saying he could not do so, &c., &c. He may only mean that Mohim told him, by word or gesture, to sign for him,—it is impossible to say which. He says later on:—"Mohim said the will has been well drawn up * * *." He further said to me:—"You must come to Calcutta." He does not depose to anything else said by Mohim.

Shama Churn, who was called in with the cutchery witnesses to the will, and Rakhal, says, "Rakhal asked him, 'How are you?' He said 'Well.'" Shama Churn said he asked him about Calcutta. He replied, "Yes, you people must go with me." Mohim could speak, but indistinctly. The will is brought and put into Mohim's left hand. He opens it (why had it been folded up? How did he need to open it? it had just been copied). He gives it to Shama Churn and says, "Do you people witness the will." Then he said Khettra Chowdhry asked Mohim to sign his name on the will. He replied, "I shall not be able to write my name." He said, "Trailakha, do you write my name, *bakalam*, &c., &c." Here it is not Trailakha Nath, but Khettra, who solemnly asks Mohim to sign. Then Mohim says, "The will has been well drawn up." Then Mohim says, "Khettra, take and keep it," Dino, the last witness, having handed it to him.

In cross-examination he says Mohim said to Ram Churn, "I have determined to go to Calcutta," and to this witness, who says he sat down and talked to him about going to Calcutta, he said, "I do not think the medical treatment here is good; I will go to Calcutta; I shall take Rakhal doctor with me."

It was perfectly well known, by everybody, Woomesh included, and Shama Churn must have known, that Mohim was going to Calcutta (he was going with Mohim), why should Mohim be at the pains of announcing it thus? This does look like an attempt at colouring, to represent something like a conversation, although

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

Shama Churn says that on this day "the indistinctness had somewhat increased, but we could understand well." Rakhal, the next witness, says that at 3 or 3·30 on the 25th (when he went to attend at the making of the will) he sat down and asked, "How are you?" He answered, "I am somewhat better to-day." Other conversation about the going to Calcutta for the purpose of medical treatment took place. "It was settled that we were to go, &c., &c., Shama Churn, Mohim, Khettra, servants and I,—these persons were to go. These words were understood, there was indistinctness; *some words I could understand after asking him two or three times.*" But it had all been settled before this, the letter taken by Tarak Nath to the pleader at Meherpur early the day before had announced it, yet all these witnesses say Mohim then announced it; afterwards he makes Mohim say, after the business of the will is over, "Do you people sign your names as witnesses;" and in cross-examination that "Mohim said to Khettra Chowdury and to all of us, see that there is no row about this matter;—" that is the caution about secrecy.

Tarak Nath is the gomastha who was sent with the letter (Ex. 5) and the draft will to Abinash Babu, the pleader at Meherpur. He is the witness who corroborates Khettra as to Mohim's knowing of the draft of the will. He says, "Khettra gave me a letter along with it (the draft) which I took and went. The letter was addressed to Abinash Babu. Mohim said, 'Take this letter and get the draft corrected by Abinash Babu and bring it back.' He said, 'There are four executors and my wife will also be executrix.' He further said, 'Rs. 300 is set apart for my wife's pilgrimage; it has to be made Rs. 600,"—adding an injunction to Abinash to keep the will a secret.

He says that on the 25th Mohim asked him to copy out the draft. He asked Trailakha to copy it, and Mohim said, "Very well, let him do it." After this was done Mohim said, "Raise me; I want to sit up." Then after (Mohim's) reading it, Trailakha said to Mohim, "Sign it." Whereon he said, "I am unable to sign, you sign my name," &c. After the signature Mohim hands the will to Shama Churn and says "Do you people become witnesses to the will." Shama Churn reads the will, and then oddly enough Mohim asks, "Is the will well drawn?" Shama Churn says "yes,"

and the matter is then proceeded with. There is some slip here. He ought to have made Mohim ask the question before *his* signature.

This witness says he compared the will with Trailakha after it had been written out. When I was comparing it with Trailakha, Mohim was having a conversation with Shama Churn and Rakhal Doctor. What these persons say they heard Mohim say has been stated: they do not depose to any such conversation.

BENGAL SECRETARIAT LIBRARY.

Pran Chand, another gomastha, says of the 25th:—"Mohim took the will in his left hand and began to look at it. Khettra said: 'Please sign it.' The Babu replied, 'My right hand is paralysed. I shall not be able to sign,' &c.; and that afterwards he said 'I have made this will, do you all sign it.'"

Bhushun, the sudder mohurrir, and a cousin of Mohim, says Mohim asked Khettra to call in the people who were outside. When they came, he said "I have made a will, do you subscribe your names as witnesses." And then the will was handed to him. "My hand is paralysed, you write my name." He says he heard about the intended will on the 24th from Mohim. He says Mohim on the 26th spoke to Rakhal, Jasoda and Woomesh: told the latter that he was going to Calcutta [still up to the last moment solemnly announcing it]. Thereon Woomesh replied "go." Mohim said "it will be settled how many days Rakhal will have to stay at Calcutta and how much he is to get."

He represents Mohim as *walking* out (not carried) that morning, supported from his room, when the final fit occurred.

Mothura Nath, another mohurrir (who says that on the 26th Mohim came out by *himself*), says he stayed in Mohim's room during his illness: says they used to talk together every day, and Mohim used to give sensible answers. He does not say anything he heard Mohim say.

All these witnesses say that Mohim was in "possession of his senses."

This is very unsatisfactory evidence of the patient's condition. The question is, what mental state he was in with reference to the making of a will, his capacity for which is challenged by the defendant's evidence, and is rendered at least a matter for careful

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

inquiry from the facts of his illness in the plaintiff's evidence itself. Paralysis on January 24th, an increase of illness on 23rd February, another and severe fit on the 2nd March, indistinct speech as stated by all the witnesses, increased by the 25th, according to Shama Churn, so greatly, that according to Rakhal Kaviraj, he had to be asked two or three times before his words could be understood.

Yet for the whole period of these six days there is nothing said by him deposed to, save as to his departure for Calcutta, or as to this will; as to the latter, no doubt, almost exactly the same two or three phrases are deposed to.

But from the persons who were near him for those days, there is nothing whatever save this, of proof, that he was of clear mind, as they say he was, and was able to speak, as these witnesses allege that on these two subjects he did.

No doubt Dr. Bepin says that after he was called in on the 20th he forbade any attempts to make Mohim speak. But then this is part of the case which he is called to support, *viz.*, that Mohim was in a far more helpless state than the plaintiff's evidence will allow. The evidence of some of the plaintiff's witnesses just referred to would, if read by itself, convey the impression that Mohim's mind was quite alert, and his speech practically free, although a little indistinct and although he was physically weak and paralysed. If anything approaching to this was the truth, some proof of this might have been adduced, apart from the story common to all these witnesses, in which almost the same things are represented as said about the execution, and about going to Calcutta and nothing else whatever. The obvious comment on it is that they did not venture to leave this common ground because they were not stating what they remembered, but what it had been agreed should be said: a short story containing some easily remembered incidents of a kind which, if not closely inquired into by the defendant, would lead to a belief, on the part of the Court trying the case, in Mohim's capacity.

Evidence of Mohim's state at this time ought to have been obtained from the females of his family,—his wife, his sister and apparently two aunts were actually in the house. Such evidence

ought to have formed a principal part of the plaintiff's case. As is observed by Lord Romilly in *Swinfen* v. *Swinfen*, in a matter of this kind the evidence of persons familiar with him whose state of mind is in question, is of as high, or perhaps higher, value than even that of a medical man, who has not known him intimately before his illness. In the present case, if Mohim's state was as the plaintiff alleges, it seems impossible but that some of the large number of persons, including these ladies who were around him, could have deposed to communications with him during these six days. Whatever injunction as to silence was made was not, according to the plaintiff's own case, much observed; indeed Mathura Nath says he and Mohim used to talk together [he does not give particulars] every day. If this is to be believed, Mohim must have talked to persons other than this servant. We do not think this can be believed. We think a fair inference from the absence of evidence of this nature is, that such evidence could not be had from those best qualified to give it, if it could be truly given.

It is true that Rashmohini's evidence was apparently limited, by the order allowing her to be examined on commission to the point of her alleged opposition to the will, a limitation which appears to have escaped the recollection of the learned Judge when he gave judgment.

But there is nothing in this; the limitation was because the application came so late. The ladies of the family ought all to have been examined as part of plaintiff's original case or their not being so explained. The plaintiff who propounds a will made under such circumstances as the present is bound to give the Court the most complete information for its guidance in its very difficult task, and must take the consequences if this is not done.

For the defence the principal witnesses are of course Dr. Bepin and Jasoda. Woomesh and the other three witnesses who saw Mohim, as they say, two of whom are in Woomesh's employ, and the third Hurrinath, a former servant of Mohim, is at variance with Khettra Nath about *nikash* accounts, must be treated as more or less partial witnesses. These last four represent Mohim's state as one very nearly of stupor. We should not attribute much weight to their evidence standing by itself

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

Hurrinath says expressly that in obedience to Bepin's orders he did not try to speak to Mohim from the 21st to the 26th Pran Krishna comes to describe Mohim as ill and unconscious when spoken to; he did not speak, tears used to fall down from his eyes, &c. This witness does not remember dates, &c., &c. His evidence may contain the truth or not; it probably contains what he has heard. Nobin Chundra says he saw Mohim at 3 o'clock on the 25th, when he says he was lying back senseless. From that time until 8 that evening he says he remained there, and Mohim was unconscious. This is to disprove the whole story of the execution of the will on that afternoon. He says it was arranged to take him to Calcutta on the 25th. On the whole, this witness's evidence is of a sort that need not be much discussed. The Judge has not accepted it; and there seems no reason for regarding it as disproving the fact of execution.

Woomesh deposes to the same effect; that is, that from the time of the fit on the 19th or shortly after it, until the 26th, Mohim was unconscious, or so nearly so, that when shouted to he only showed some sign of having heard the voice; would state, but not with consciousness.

His evidence, too, is also directed to proving that the will could not have been executed. He says he went five or seven times to see Mohim, day and night, on the 25th, and that his condition was very bad.

Dr. Bepin, who knew Mohim before his illness, is the most important witness. He certainly attended Mohim from the 20th to his death. A suggestion made in the evidence of Trailakha Nath and of Tarak Nath that Bepin and Jasoda were dismissed from attendance before the time when the will was executed in contemplation of the departure for Calcutta, is against the rest of the evidence and need not be regarded, save so far as it may manifest a wish to get them out of the way, at that time without foundation; in fact Bepin's attendance was constant No doubt he speaks with some vagueness, which seems strange enough, as to his having been there every day. On the whole, the balance of evidence is that he was there every day. There can be no doubt that he had ample opportunity of judging of Mohim's condition. He says that for the first day or two Mohim replied to questions with

great difficulty; after that he could not speak at all, but used to try and make sounds; after I had repeatedly shouted to him, he used to try and make a sound.

He says that after this Mohim got worse. In this he does seem corroborated somewhat by what has been noticed as said by Shama Churn and by Rakhal.

He admits that he suggested a will; this indeed is common to the case on both sides. He does not positively deny that he did so on the first day, as Khettra says he did. But he thinks it was not until two or three days after his first visit. His advice, he says, was only given with reference to the case of Mohim's getting better; for the patient was not then, he thinks, able to make a will (by which we think he must mean, able consciously and intentionally to go through the form of execution).

There is some little obscurity about this reasoning. That he should have been made to think of suggesting a will in case of Mohim's getting better, by observing, as he says he did, that he was getting worse, seems a little contradictory, though perhaps not seriously so. On the whole, I think the probability is that he suggested a will on the first day. Woomesh, who says Dr. Bepin attends professionally at his house, was against a will being made, when Bepin made the suggestion to Khettra in his presence, and probably he did not suggest it again. He says he only spoke of it once.

This suggestion is the only part of Bepin's evidence which at all favours plaintiff's case, and to some extent it does so.

Towards the close of his evidence he describes Mohim as only showing signs of attention when he spoke to him, after he had "hammered" as he expresses it, and asked four, five, or six times; and as then being unable to make a sign. We are disposed to attribute this evidence to the period after the fit on the 26th; at any rate, I am not sure it refers to the earlier period.

But upon the whole of Bepin's evidence it is clear that unless it is deliberately false, Mohim was in a state of great and increasing apathy amounting almost to stupor, certainly after the first one or two days which followed the fit of the 19th, and that he was not master of himself even on those two days.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

Jasoda's evidence was given on commission which was granted during the examination of Bepin, whom he was to be called to support. We do not think that good ground appears for this, and evidence given in such a way is not satisfactory. He certainly was in communication with Bepin during the latter's evidence on the subject of it, which affects the weight of his evidence and in some measure that of Bepin too. We do not think he can be much relied on. In his direct evidence he says, "During the first day or two, whenever he or others shouted to Mohim, he would answer indistinctly 'well.' If he were asked five, seven, ten or twenty times in a loud voice 'Are you well, he would occasionly utter that word indistinctly." But in his cross-examination, after he had been pretty briskly brought to task about his communications with Bepin, he said, "One day he spoke clearly. I did not on any other day hear so as to be able to deny if he could understand and answer. Naturally I concluded that he could not. He spoke clearly for a day or two, after I first saw him. That was on the first or second day. When he replied clearly to my question, Bepin Babu was not present."

He is not examined or re-examined as to what he means by "clearly;" whether he refers to some monosyllabic answer given clearly, or to much more; indeed, one of the great difficulties in this whole case arises from the deplorable manner in which the witnesses on both sides were examined. But so far as this goes, it is somewhat in support of plaintiff's case as to the first day or two; save in this, he goes rather beyond Dr. Bepin's evidence.

Now, what the Judge has found, in favour of the plaintiff upon the conflict of evidence, amounts, we think, to this, that on the 25th Mohim had his senses sufficiently to know that what was being executed was to be his will, and to consent to and authorise it being executed for him. He uses the word "consciousness" throughout. He does not seem to think either of volition or of intelligent comprehension. He points out that "it is admitted by Dr. Bepin that Mohim had slight consciousness all along up to the 26th," that during the first two or three days he could give intelligent answers to his questions, etc. It is also admitted that even when Mohim ceased to give any answers (that we understand to mean after the first two or three days) he could

recognise people and shed tears when questioned. If Mohim was utterly helpless and lost all consciousness from the 20th to the 25th, he could not be made to sit though assisted by others, etc.

He finds that Mohim had consciousness,—in what degree he does not say. He means, we understand, that he was not in a state of stupor, a term applied to that partial loss of consciousness "in which, for instance, a patient seems to be asleep but opens his eyes for a moment when spoken to and then relapses into his former state." He does no more than find that he had so far a higher degree of consciousness than this, that he was capable of sanctioning the execution of the paper as his will.

This might perhaps, though it is doubtful, involve such an amount of capacity as is referred to in the final paragraph of the judgment in *Harwood* v. *Baker* above mentioned, where their Lordships refer to the case of a will made in pursuance of an intention deliberately formed in a state of health, and carried out in illness. There is nothing of the sort in this case as to previous intention, nor is the degree of capacity found, such as we understand their Lordships in that passage.

The evidence as to the preparation of the will, given by Khettra Nath and by Tarak Nath, which alone supports any case of knowledge and approval of the contents of the will by Mohim, must now be considered.

Khettra Nath says he and Mohim "consulted" on the night of the 20th, after Mohim had been told what Bepin had said. He does not say what passed between them—whether Mohim said anything to him, or only listened to whatever he may have said,—except that Mohim mentioned the names of executors. He says in cross-examination, "I do not remember whether I or Mohim spoke about the terms of the will." That is a remarkable statement, and in my opinion is not seriously qualified in its effect by the correction and contradiction which immediately follows it; "Mohim spoke about the terms. I gave my opinion. I did not myself suggest any of the terms." We are disposed to believe as to this, 1st, that the correction is made on seeing that he had made a slip in the first answer, and that the correction which contradicts it is untrue; 2nd, that the first answer itself is untrue. It is impossible that he should have forgotten whether he or Mohim

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

spoke of the terms. It is equally impossible that, if it was Mohim who did so, he should have at first forgotten that. The conclusion we draw is that he alone spoke of them to Mohim, that he at first tried to avoid a plump falsehood by saying he did not remember, and then seeing he had made a slip, told a plump falsehood to get out of it. To return to the earlier part of his cross-examination with which we have just been dealing, he says he made a list of the properties on the 20th which he does not produce. He made a draft from the list on the 21st or 22nd; and this draft Mohim saw on the 23rd. When he was getting worse, Mohim said to me "I do not know whether what you have done will be according to law. Go and get it revised by the pleader of Meherpur." I sent it on the 24th through Tarak Biswas. The draft came back on the night of the 24th Falgoon. It contained just an alteration here and there. What I wrote was there, but two conditions were added.

That is what he says about sending Tarak Nath. That witness, called on the following day, expands it thus :—

"On the night of the 23rd Falgoon, it was suggested that a will should be made, and I was sent to Meherpur. On the morning of the 24th I went to Meherpur. A draft of the will was made. Khettra Chowdhry gave me a letter along with it, which I took and went. The letter was addressed to Abinash Babu. Mohim said "Take this letter and get the draft corrected by Abinash Babu and bring it back." He said there are four executors, and my wife also will be executrix. He further said "Rs. 300 is set apart for my wife's pilgrimage; it has to be made Rs. 600." He further told me to ask Abinash "to keep this a secret, that there may be no row."

He then describes his visit to the pleader, which I see no reason to doubt: says he came back with a draft from Abinash, which he gave, with the draft he had taken, to Mohim. This of course means to Khettra. This original draft is not produced—a very important omission.

In cross-examination he says, "I am Mohim's gomastha at Dariapur, &c What he told me orally was also written down in the letter. Mohim asked Khettra to mention in the letter two matters which had been omitted in the draft: that was why he

wrote. He wrote the letter inside Mohim's rooms because it was to be delivered secretly.

Now, if this be truthful evidence, how is it that Khettra Nath said nothing about it? It is the only evidence save the one fact stated by Khettra Nath about executors, and that in cross-examination, to show that Mohim knew of anything that was in the will as drafted. Then, what can it possibly have meant? Why should such a letter be written for such a reason? A draft is sent, containing at any rate instructions, it may be supposed from this evidence, that Rs. 300 was the sum mentioned in it. Then why not alter the draft, in place of writing a letter, and why write about the executors?

The draft was there. If plaintiff had produced the draft, this evidence might perhaps be tested. As it is, the draft being not produced, the evidence is simply meaningless, and I cannot avoid the conclusion that it was devised to fill up a gap, which, on considering Khettra's evidence (which closed the day before this man was called), was found to exist there; namely, the absence of all statement in it of Mohim's knowledge of anything in the will. This had not been thought of, as I conclude, when the evidence to be given by Khettra Nath in chief was considered. The part of the cross-examination to which we have referred, as to conversation between Khettra and Mohim about the terms of the will, drew attention to this defect, but too late to supply it in Khettra's evidence: so it was supplied the next day in Tarak Nath's, and in this childish manner. We do not believe this story of Mohim's conversation with this witness on the morning of the 24th.

Hurrinath Dutta, mohurrir of Abinash, produces the letter (Ex. 5) dated 23rd Falgoon. Abinash, he says, is unwell and cannot appear to give evidence; and we must say he gives a very unsatisfactory account of that gentleman's illness as furnishing reason for his absence from the witness-box. He does not prove Ex. 5. But if it be that which Tarak Nath took to him, then nothing was said about either Rs. 300 or Rs. 600 in the letter, and Tarak Nath's story, as to Mohim's speaking of this matter, wants corroboration,—one might indeed say is contradicted in that particular.

1893

WOOMESH CHUNDER BISWAS v. RASHMOHINI DASSI.

If this letter is genuine, there is one passage in it which invites explanation. The letter begins by mentioning the illness of the 20th, the attendance of Bepin, the intention to go to Calcutta, and then states the intention to make a will. "Having regard to the nature of my illness, my relatives suggest that it is necessary that I should make a will. I have written to Nurrohurry Babu by post for a draft. But as it is doubtful whether I shall get it before I leave for Calcutta, I have got one made at home. It is doubtful whether it is according to law. You know what disputes there are with my co-sharers. You will send me such a draft as may be perfectly legal," &c., &c.; then refers to the draft. We quote from rough translation. The letter is not in the paper book.

It does not appear from evidence, or from the letter, what this doubt was. Was it a doubt on the part of Khettra, the writer of the letter, conveyed, however, verbally by Tarak Nath, as to the validity of Mohim's will, if he made one in that state? About this we are told nothing. However this may be, this letter confirms us in the disbelief with which, without it, I should regard Tarak Nath's evidence as to Mohim's speaking to him. It is unfortunate that Abinash Babu did not give his testimony.

There only remains, on this point, Bhushun, who says Mohim told him on the 24th, after the will had been brought back from Meherpur, "that it would be written out to-morrow."

Upon the whole evidence I am wholly unable to say that the plaintiff has given satisfactory proof that the will propounded is that of a free and capable testator, or that there is any satisfactory evidence that Mohim knew and approved the contents of the will. We feel much doubt whether he was, on the 25th, in a condition even to know that a will was being executed for him, and to authorise this. But even if he was, we do not believe that, at the time when Khettra says they consulted about it, he was in a state to consider, and to make a disposition of his property. Nor do I believe that at the time when Khettra says he showed him the draft, he was in a condition to consider it. Nor that, on the 24th he was in a condition to consider the draft prepared by the pleader. We wholly disbelieve that on that occasion (the 24th) he read it over to himself in a low voice, as Khettra ventures to assert; we do not regard the apparent contradiction of this which is in

Mathura Nath's cross-examination. We disbelieve it, because we disbelieve that Mohim was capable of doing it. We think it would be idle to give any weight to the statements of the witnesses given in different places that Mohim read the will, such as might justly be given to the fact of reading by a person shown to be in a state of active intelligence. We do not believe that he did or could read it: we think that the evidence of Dr. Bepin, aided by the admissions of the plaintiff's witnesses, the history of the illness, and the circumstances of suspicion which arise in the case, lead to the conclusion, 1st, that Mohim is not shown to have had due testamentary capacity; 2nd, that the balance of evidence in this difficult case is, on the whole, to the effect that he had not testamentary capacity, and that there is no adequate proof whatever that he knew or approved of the contents of the will. It is distressing to be compelled to this conclusion. The will seems a proper one. The power of adoption given by it, one would desire, were it possible, to maintain. We have anxiously gone over this record several times for that reason, chiefly. But we think it would be impossible, without violating the principles of law repeatedly laid down for the guidance of Courts of Justice in such cases, to let this will stand. We cannot make a will for Mohim, or grant probate to a will that has been made for him and is not shown to be his will, however proper its provisions may be.

We think the appeal must be allowed, the decision of the lower Courts set aside, and the application for probate dismissed with costs.

J. V. W. *Appeal allowed.*

Before Mr. Justice Beverley and Mr. Justice Hill.

AMIR DULHIN *alias* MOHAMDI JAN (DEFENDANT No. 1) *vs.* BAIJ NATH SINGH *alias* BAIJU SINGH AND OTHERS (PLAINTIFFS).*

1894 *Jan.* 3.

Mahomedan Law—Debts—Suit by creditor of deceased Mahomedan against his heir—Administration, suit for.

In a suit against the widow of a Mahomedan on the ground that she was in possession of his estate, and where there were other heirs of the deceased,

*Appeal from Appellate Decree No. 1434 of 1892 against the decree of J. Tweedie, Esq., District Judge of Patna, dated the 10th of May 1892, modifying the decree of Babu Amrito Lal Pal, Subordinate Judge of that district, dated the 28th of September 1891.

1894

AMIR DULHIN v. BAIJ NATH SINGH.

Held, following the principle laid down in the case of *Mutty Jan v. Ahmed Ally* (1), that the suit was properly brought against the widow and that her liability was to be measured not by the extent of her interest in her late husband's property, but by the amount of the assets of his estate which had come into her hands, and which she had not duly disbursed in the discharge of the liabilities to which the estate was subject at her husband's death.

THIS was a suit on a *roka* dated 19th August 1887 alleged to have been executed by Mahomed Yusuf Hossain Khan, deceased, for consideration therein stated. The defendant No. 1 was the widow of Mahomed Yusuf Hossain Khan; the defendant No. 2 was his nephew, who it was alleged stood security in the *roka* for the debt. The execution of the *roka* and the receipt of the consideration were held to have been duly proved by the plaintiff, and the only defence material to this report was that the defendant No. 1 was not the only heir of her deceased husband, but that there were other heirs who should have been made defendants, and without whom the suit was untenable.

For the disposal of this point the remaining facts, and the arguments, are sufficiently stated in the judgment of the Court.

Babu *Umakali Mookerjee* for the appellant.

Babu *Dwarkanath Chuckerbutty* for the respondent.

The judgment of the Court (BEVERLEY and HILL, JJ.) was as follows:—

This is a suit on a *roka* for the recovery of a sum of Rs. 2,607-5-8. The plaintiffs are the representatives of the payee of the *roka* who is now dead. The defendants are the widow of the maker of the *roka* and a person who is sued in the character of a surety for its repayment. As against the latter, however, the suit has been dismissed and he is not concerned in this appeal. The maker of the *roka* was a Mahomedan, and the first defendant, his widow, is sued as being in possession of his estate, the relief claimed being that a decree for Rs. 2,607-5-8 principal with interest be passed first against the estate left by Yusuf Hossain Khan (that is, the maker of the *roka*) and held and possessed by defendant No. 1, and in the event of non-realization, then against the person of the second defendant. There is a prayer also for such further relief as in the opinion of the Court the plaintiff may be entitled to.

(1) I. L. R. 8 Calc. 370.

The pleas of the first defendant so far as they are now material were directed in the first place to the frame of the suit. It was pleaded that the suit was bad for non-joinder of all the legal heirs of the deceased who are named, and then that the first defendant was not in possession of any property of the deceased in the capacity of his heir. She did not, it is to be observed, deny her possession, save in this qualified manner; and the Court of first instance has found that there is some evidence, though it has refrained from expressing an opinion as to its value, that after the death of her husband the first defendant disposed of an elephant, horses, and carriage belonging to his estate. That Court has, however, refused to give effect to this evidence apparently on the ground only that there was no evidence to show what the value of the property in question amounted to. On the question of parties it found that the suit had been properly brought against the widow of the deceased to the exclusion of the other heirs of her husband, as she alone had been granted a "certificate of heirship," by which presumably is intended a certificate for the collection of debts, by the District Judge. But such a certificate would not, it may be remarked, constitute her the representative of her late husband's estate in the sense understood by the Subordinate Judge. In the result the Subordinate Judge passed a decree in favour of the plaintiff for the amount claimed with interest to be realized "from the properties left by the deceased Yusuf Hossain Khan."

Against this decree the first defendant appealed to the Court of the District Judge, and there, it is said by the learned Judge in his judgment, two points were argued, one as to the correctness of the decision of the Court of first instance on a question relative to the stamp borne by the *roka* in suit, and the other as to the necessity for adding the other heirs of Yusuf Hossain Khan. On the first point the learned Judge found against the appellant, but on the second in her favour; and was accordingly, it appears, about to dismiss the suit, but thought it better, on consideration, to give the respondents the opportunity of withdrawing the suit in its then form, with liberty, if they chose to avail themselves of it, to bring a fresh suit against all the heirs of the deceased, and so held his hand. The respondents did not,

1894

AMIR DULHIN v. BAIJ NATH SINGH.

however, see fit to avail themselves of the liberty thus given them, their avowed reason being that any fresh suit which might then be brought by them against the other heirs of the deceased on the *roka* would be barred by limitation. This difficulty they brought to the notice of the learned Judge, and they urged also that even if they were not entitled to treat the appellant as sole heir, by which probably they meant as the legal representative of the estate of the deceased, they were nevertheless entitled to get a "partial decree" as against her proportionate to the assets actually held by her, and the learned Judge, actuated by reasons which can hardly be called in question, set down the appeal for further argument on this point. The result of this further argument was that the learned Judge, to use the language of his judgment, allowed the decree of the Lower Court to stand—"made a little more clear in the expression of it, as in the nature of a 'partial decree.'" It is not very easy to follow the learned Judge in the interpretation which he places upon the decree of the Court of first instance, since, as has been seen, that Court made the claim realizable from the properties of Yusuf Hossain Khan without limitation, its view being apparently that the estate was fully represented by the widow by virtue of her "certificate of heirship." But, be this as it may, the learned Judge gave effect to his understanding of the matter in his own decree, which after dealing with the costs of the Lower Court proceeds:—"In all other respects it (*i.e.*, the appeal) is dismissed with the declaration that the debt due by the deceased to the plaintiffs is recoverable only from such assets of the deceased as can be shown to have been in the hands of the principal defendant at the time at which this suit was filed against her."

From this decree the 1st defendant has now appealed to this Court on several grounds. The first is that the Lower Appellate Court ought to have dismissed the suit, because the plaintiffs having based their claim on the ground that the appellant was the sole heir in possession of all the assets, they had failed in the opinion of that Court to prove their case. This plea, if we understand it aright, seems to us to proceed on a misconception of the nature of the suit. There is no allegation or suggestion in the plaint that the appellant represented the estate of her late husband. She is sued merely as being the person in possession of

it, and consequently the failure to prove the allegation of exclusive possession on her part does not involve a failure to establish her representative capacity. The theory of representation is not known to the Mahomedan law. Under its provisions the estate of a deceased person devolves immediately on his death upon his heirs, charged however with his debts, and they are the persons through whose medium the property ought ordinarily to be reached. The plaintiffs seem to have assumed that the appellant was the sole heir of her husband, and that she was, probably as a natural consequence, in exclusive possession of his property, the fact of possession being the basis upon which their suit was founded. In both assumptions no doubt they appear to have been mistaken, but it does not follow that because they failed in establishing that she was possessed of the whole, they are precluded from showing that she is in possession of a part. There is no question here in fact of a change of the capacity in which the lady was sued; and we think that had it been shown that she was in fact in possession of a part of the assets of the deceased, relief might, notwithstanding the allegation that she was in possession of the whole estate, have been obtained against her.

The next plea in appeal calls in question the propriety of the action of the Court below in passing a decree in the plaintiffs' favour, notwithstanding that at one stage of the proceedings it was of opinion that the suit ought to be dismissed. We do not think, however, that this plea is entitled to much consideration. The Judge did no doubt at one time entertain the opinion referred to, but before he had completed his judgment he thought it advisable to hear further argument, and it was on the further argument that he came to a different conclusion. In taking this course he has not, so far as we are aware, transgressed any legal principle, or done more than Judges not unfrequently find themselves constrained to do.

The next plea is in effect a repetition of that with which we have first dealt above, and what we have there said sufficiently disposes of it.

The next raises a question of a somewhat more serious kind, and one with respect to which it cannot be said that the law is administered with complete uniformity. It asserts that a creditor has

1894

AMIR DULHIN v. BAIJ NATH SINGH.

no right to sue only one of the heirs of a deceased debtor and recover the entire amount of the debt from the assets which may have come to the hands of that heir. The proposition is somewhat more widely stated than was probably intended, for we did not understand the learned pleader who appeared for the appellant to contend that it would be applicable to a case in which it appeared that a single heir had possessed himself of the whole of the property of the deceased. If we rightly apprehended his argument it was directed to this, that the amount decreed ought to be proportionate to the interest in the estate of the particular heir, and that when it is sought to recover the whole of the debt all the heirs ought to be before the Court. Stated in that form the proposition is one of which there is much in favour. An individual heir cannot be said with strict propriety to represent his co-heirs in a suit brought by a creditor to enforce his claim against the property of the deceased proprietor. The right of each heir is several and distinct, and arises, as has been said, immediately on the death of the person whose heir he is. There is no intermediate vesting in any one, and no rule of Mahomedan law by which an individual heir, as such, may be taken to represent either the estate of the deceased or the heirs generally; and it has been held by the High Court at Allahabad that a sale made under a decree obtained by a creditor of a deceased Mahomedan in a suit to which a single heir only was a party might on this principle be set aside at the instance of the other heirs to the extent of their interests, contingently, however, on their paying their proportionate share of their ancestor's debt: (see *Jafri Begam* v. *Amir Muhammad Khan* (1) and *Muhammad Awais* v. *Harsahai* (2)); and in another case in the same Court, it was held that a decree ought not to be passed against some only of the heirs of a Mahomedan for the whole amount of his debt, but ought to be confined to an amount proportionate to their shares in the property of the deceased (*Pirthi Pal Singh* v. *Husaini Jan* (3)).

On the other hand, however, it has been held in this Court in the case of *Mutty Jan* v. *Ahmed Ally* (4) where certain heirs of a deceased Mahomedan sued to set aside a sale in execution of a decree passed in a creditor's suit to which they were not parties,

(1) I. L. R., 7 All., 822.
(2) I. L. R., 7 All., 716.
(3) I. L. R., 4 All., 361.
(4) I. L. R., 8 Calc., 370.

that a creditor's suit is in the nature of an administration suit, and as such, an heir in possession is bound to account for any assets that may have come into his hands, and to that extent is liable to pay the creditors. The principle of this case has never, so far as we are aware, been since dissented from in this Court, though it was undoubtedly subjected to unfavourable criticism in the case of *Jafri Begun* v. *Amir Muhammad Khan* (1) referred to above. And we think that apart from the consideration that it is an authority of this Court which has remained unquestioned now for several years, it embodies a salutary rule and one to which effect ought to be given. If the creditor of a deceased Mahomedan is to be confined to the recovery of a fractional portion of his claim, notwithstanding that the assets may be wholly in the possession of the person through whom it is sought to enforce it, or is to be postponed until the estate has found its way into the hands of all the persons who are entitled to share in it, as might frequently be the case, we can conceive that very grave injustice might in many cases be perpetrated, and a method sanctioned by which it would be easy to place obstacles in the way of the realization of the just obligations cast upon the estate. And the technical difficulties which influenced the decisions to which reference has been made in the Allahabad Court, unless they are insuperable, which, in our opinion, they are not, ought not, we think, to be allowed to override such considerations as these. In England, where rules of practice would probably be enforced with greater stringency than in this country, it has been held by a Judge of much experience that, when a person possesses himself of the assets of an intestate without having administered, a bill for an account of the specific assets he has received would lie against him as executor *de son tort*, though there be no legal personal representative—*Cooke* v. *Whittington* (2), and see also *Rayner* v. *Cochler* (3), and *In re Lovett* (4). And though the analogy may not be complete between the Mahomedan heir, who is in possession of more than his share of the inheritance, and the executor *de son tort* of English law, it is yet sufficiently close to sustain a comparison. "If," it is said in the last of the cases just

(1) I. L. R. 7 All., 822.
(1) L. R. 16 Eq., 534.
(2) L. R. 14 Eq., 262.
(3) L. R. 3 Ch. D., 198.

1894

AMIR DULHIN v. BAIJ NATH SINGH.

referred to, "you cannot sue a person as executor *de son tort*, then any person may enter upon and take possession of the property of a deceased, and he cannot be sued for doing so"—a conclusion which the learned Judge who tried the case refused to accept.

In our opinion, then, the suit was properly brought against the appellant, and her liability, we think, is to be measured, not by the extent of her interest in her late husband's property, but by the assets which have come to her hands, and which she has not disbursed duly in the discharge of the liabilities to which the estate was subject at her husband's death.

The next point taken in the pleas of appeal is that the plaintiffs, having failed to prove that the appellant was in possession of any of the assets of the deceased, were not entitled to the judgment of the Court. If the premiss here asserted were true the conclusion might no doubt follow; but we do not understand the learned Judge to have arrived at any such conclusion. He has found no doubt that the appellant was not in possession of all the property of the deceased, but his decree would be unintelligible, had his opinion been that none of the deceased's property had come to her hands. His decree is indeed erroneous in that he confines the enquiry to the assets, which can be shown to have been in the hands of the appellant at the time of the institution of the suit, and in that it makes no provision for the allowance of sums duly disbursed by her; but it cannot, we think, be impugned on the ground now in question.

Lastly, exception is taken to the allowance of interest on the *roka* after due date, as well as to the rate allowed, but we think that in neither of those particulars is the decree incorrect.

We think, however, that the decree ought to be amended in the respects which we have mentioned above, namely, that the enquiry should be as to the assets received by the appellant since her husband's death, and that allowance should be made her for such sums as she may have paid thereout in discharging the liabilities of the estate. Subject to these amendments, the decree will stand, and the case will go back to the Lower Court in order that the inquiries now directed may be carried out. We make no order as to costs.

J. V. W. *Decree varied and case remanded.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

DWARKA NATH DUTT, CHAIRMAN OF THE BARISAL MUNICIPALITY (DEFENDANT), *v.* ADDYA SUNDARI MITTRA AND OTHERS (PLAINTIFFS).*

1894 *Jan* 5.

Bengal Municipal Act (Bengal Act III of 1884), *ss* 85, 87, 91, 92, 112, 113, 116—*Persons occupying holdings—Liability to assessment—Municipal Commissioners, power to tax—Assessment tax.*

The word "liability" in the 2nd paragraph of section 113 of Bengal Act III of 1884 means liability apart from the question of occupation, and must be taken to refer to the liability to assessment or rating of a person who is the occupier of a holding.

The same restricted meaning must be placed upon the word "liability" in s. 116, which section has no application to a dispute as to whether a person assessed to a tax does or does not occupy a holding; and a suit brought to set aside an assessment on the ground that the person assessed does not occupy a holding is not therefore barred by the provisions of section 116.

THIS was a suit for, amongst other declarations, a declaration that a resolution passed by the Commissioners of Barisal holding the plaintiffs liable to be taxed under Bengal Act III of 1884 was illegal and inoperative.

It appeared that one Prosunno Coomar Ghose, who was the *am-mukhtar* of a lady named Kadumbini Debi, occupied on behalf of the lady a holding within the municipal limits of Barisal. For this holding Kadumbini Debi had been assessed and taxed. Subsequently to such assessment, the plaintiffs, the executors of the estate of Rai Mohan Mittra, executed an *am-mukhtarnamah* in favour of Prosunno Coomar Ghose, and were taxed on this same holding by the municipal authorities under section 85 of Bengal Act III of 1884, on the ground that Prosunno Coomar Ghose transacted business for them in the holding. It was admitted that the plaintiffs had no holding of their own or on behalf of Rai Mohan Mittra's estate within the municipal limits of Barisal, other than that alleged against them. On being assessed in the sum of Rs. 30, the plaintiffs preferred their objections to such

* Appeal under section 15 of the Letters Patent, No. 23 of 1893, against the decree of Mr. Justice Rampini, one of the Judges of this Court, dated the 7th July 1893, in appeal from Appellate Decree No. 1617 of 1892.

1894

DWARKA NATH DUTT v. ADDYA SUNDARI MITTRA.

assessment, but their objections being disallowed under section 114 of that Act by the Commissioners, they brought this present suit for the above mentioned purpose.

The Municipality contended that the plaintiffs had been properly assessed under sections 85 and 87 of the Act, and that in any case the assessment was final and could not be set aside by any Civil Court in consequence of the provisions of section 116 of the Act.

The Court of first instance gave the plaintiffs a decree holding that the defendant Municipality in taxing the plaintiffs had exceeded their jurisdiction.

The Lower Appellate Court, however, reversed their decision on the ground that the suit was barred by the provisions of section 116.

The plaintiffs appealed to the High Court, and on the case coming on before MR. JUSTICE RAMPINI sitting alone, the learned Judge, after stating that there was no doubt on the authorities that a Civil Court could interfere with and set aside an act of a Municipality when it exceeds its powers, and after stating the facts, continued as follows:—

"The question which is material in this case is whether on the facts found by the Lower Courts the Municipality has exceeded its powers and jurisdiction.

"Now the facts as found by the Lower Courts, stated briefly, seem to me to be (1) that under section 85 the Municipality has power to tax persons 'occupying holdings within the Municipality'; (2) that as a matter of fact the plaintiffs do not occupy any holding within the Municipality; (3) that nevertheless the defendant Municipality has taxed them, ostensibly under the provisions of section 85. On these facts it would seem that there can be no doubt that the Municipality has exceeded its powers and its jurisdiction, and that, as laid down in *Nundo Lal Bose* v. *The Corporation of Calcutta* (1), the Civil Court has power to interfere. In *Nundo Lal Bose's* case the Corporation of Calcutta were found to have assessed the plaintiff on a wrong principle. They had power to assess houses on their annual value, *i.e.*, their annual letting

(1) I. L. R. 11 Calc., 275.

value. They assessed the plaintiff's house not on its annual letting value, but on a percentage on the total cost of its construction, and it was held that they had acted beyond their powers, and their assessment was set aside. Now applying the principle of that case to the present one, it would seem to me that when the jurisdiction of the Municipality is clearly confined to the "taxing of persons occupying holdings within the Municipality" it is apparent that they have exceeded their powers and have acted without jurisdiction. It would not, I think, be reasonable to hold that under the cover of section 85 the Municipality can tax anybody they please, whether occupying holdings within their limits or not, and that such persons should be absolutely without redress.

"On behalf of the respondents it is argued that as long as they deal with a person's liability to be assessed, they cannot exceed their powers, even if they exercise them wrongly. The case of *Manessur Dass* v. *Collector and Municipal Commissioners of Chupra* (1) has been cited in support of this argument. But the word "liability" in section 116 would seem to mean the liability of "persons occupying holdings within municipal limits," and not the liability of anybody without restriction. As for the case of *Manessur Dass* v. *Collector and Municipal Commissioners of Chupra*, no doubt the language of the Chief Justice in that case may at first sight seem to support the view of the respondents, but I think the learned Chief Justice, when he says that "even supposing the Commissioners had exceeded their powers, the Civil Court has no right to interfere," meant to lay down no general principle. This observation must be interpreted with reference to the facts of the case he was then deciding. The Commissioners in that case had not taxed a person whom they had no right to tax. The plaintiff in that case had a holding within the municipal limits; he was liable to be taxed The question was, whether his tax was too much, and whether the Municipal Commissioners in disposing of his appeal had adopted an improper procedure.

"Then it is objected to the case of *Nundo Lal Bose* v. *The Corporation of Calcutta* (2) that the High Court proceeded by a

(1) I. L. R. 1 Calc., 409. (2) I. L. R., 11 Calc., 275.

1894

DWARKA NATH DUTT v. ADDYA SUNDARI MITTRA.

writ of *certiorari*, and (2) that the case was decided under Bengal Act IV of 1876, and that the terms of section 117 of that Act are different from and are not so strong as the provisions of section 116 of Bengal Act III of 1884.

To this it may be replied (1) that though the procedure of this Court on its Original and its Appellate sides may be different, yet the case lays down a principle which is common to both sides; (2) that the wording of the two sections may be different, but they both mean the same thing, *viz.*, that the orders of Municipal Commissioners are final and conclusive, and cannot be questioned as long as the Commissioners act within their powers, however mistakenly and even improperly. Neither of the sections would seem to lay down that a Civil Court cannot interfere when Municipalities exceed their powers, and tax people whom they have no jurisdiction to tax. For these reasons I decree this appeal."

The Chairman of the Municipality appealed under section 15 of the Letters Patent.

Mr. *Jackson* (with him Babu *Lal Mohan Das* and Babu *Chandra Kanta Sen*) for the appellant:—The suit does not lie; the order of the Commissioners is final under section 116. There can be no interference by a Civil Court whether the Commissioners are right or wrong. Mr. Justice Rampini says that on the facts found by the two Lower Courts the plaintiffs are not liable to the tax imposed upon them, which is a matter of law. It cannot be said that the Commissioners have acted without jurisdiction because they have assessed the plaintiffs.

The case of *Nundo Lal Bose* v. *Corporation of Calcutta* (1) was one on *certiorari*, and was decided on the point that the procedure made use of by the Commissioners was improper. If an error affects the jurisdiction, the Civil Court will interfere, but if not, the Courts have no power to interfere. This is not, however, a case on *certiorari*. The cases of *Leman* v. *Damodaraya* (2) and *Joshi Kalidas Sevakram* v. *Dakor Town Municipality* (3) were decided on the ground that the prescribed machinery for the

(1) I. L. R. 11 Calc., 275. (2) I. L. R. 1 Mad., 158.
(3) I. L. R., 7 Bom., 399.

levy of the tax was not followed; and *Brindabun Chunder Roy* v. *Serampore Municipal Commissioners* (1) was decided on the ground of improper procedure: none of these cases therefore apply. The words in the Act under which *Nundo Lal Bose's* case is decided are not nearly so strong as the words of section 116. As to the merits, the plaintiffs were taxed as occupiers on behalf of both their masters.

[Reference was also made to sections 59, 60, 62, 63 and 85 of Bengal Act III of 1884.]

Mr. *Pugh* (with him Babu *Akhil Krishna Ghose*) for respondents.—Section 63 has no application to this case, as it falls under that portion of the Act which deals with control: the procedure is laid down by sections 44, 113. Section 87 shows that there must be some one occupying a holding; but section 94 does not include the case of a new occupier in addition to the old one. Section 113 allows a review in three matters, and section 116 refers to two matters only; it states that no objection shall be taken to rating, but section 87 shows that there is a case in which an occupier is not liable to be rated. Whether section 116 is to be read alone or with other parts of the Act, it must be concluded that the Court has power to prevent the Commissioners from taxing people whom they are not entitled to tax.

As to excess of jurisdiction being shown by evidence, see *Queen* v. *Sheffield Railway Company* (2), *The King* v. *Long* (3), and *In re Penny* (4). In *Queen* v. *South Wales Railway Company* (5) *certiorari* was allowed to issue, notwithstanding that it was entirely taken away by the statute. I say that in finding without evidence that I am taxable as an occupier, the Commissioners were not acting within their powers. [Reference also was made to the different steps taken by the Commissioners when assessing, showing that irregular procedure was employed, and to *Nundo Lal Bose* v. *Corporation of Calcutta* (6) and *Maneesur Dass* v. *Collector and Municipal Commissioners of Chupra* (7).]

(1) 19 W. R 309.
(2) 11 A. & E., 194.
(3) 1 M. & Ry., 139.
(4) 7 E. & B., 660.
(5) 13 Q. B., 988.
(6) I. L. R., 11 Calc., 275
(7) I L R., 1 Calc., 409.

1894

DWARKA NATH DUTT v. ADDYA SUNDARI MITTRA.

The judgment of the Court (PETHERAM C.J. and BEVERLEY J.) was delivered by

BEVERLEY J.—This is a Letters Patent appeal from a decision of Mr. Justice Rampini sitting alone on the Appellate side of this Court, in a suit which was brought under the following circumstances.

The plaintiffs alleged that they had been assessed by the Municipal Commissioners of Barisal to pay a tax under section 87 of the Bengal Municipal Act, 1884, notwithstanding the fact that they did not occupy any holding within the Municipality, and they prayed for a declaration that a resolution of the Commissioners holding them liable to be assessed to the tax was illegal and inoperative.

In answer the Chairman of the Municipality contended, first, that the order of the Commissioners in the matter was under the Act final and conclusive and could not be questioned in the Civil Court, and, on the merits, that the plaintiffs were liable to assessment by reason of their employing as their *am-mukhtar* or agent a person who occupied a holding within the Municipality, notwithstanding that that holding belonged to another person for whom the *mukhtar* also acted as agent, and who had already been assessed in respect thereof.

The Munsif gave the plaintiffs a decree, which, however, was reversed on appeal by the Subordinate Judge on the ground that the suit was barred by section 116 of the Act. On second appeal the learned Judge of this Court has reversed that judgment and restored the decree of the first Court.

The Chairman of the Municipality now appeals.

Upon the facts found by the Lower Courts, it is clear that the plaintiffs, the respondents before us, do not occupy any holding within the Municipality of Barisal, that they have nevertheless been taxed under the provisions of the Bengal Municipal Act, 1884, and that their application to have themselves exempted from the assessment was heard and rejected under section 114 of that Act; and the question before us now is whether under those circumstances the Civil Court can interfere, regard being had to the provisions of section 116 of the Act.

Upon this question we are of opinion that the decision of the learned Judge of this Court is right, and that this appeal should be dismissed with costs.

It seems to us unnecessary to go into the general question discussed by the learned Judge whether section 116 operates as a bar to the intervention of the Courts in cases where the Municipal Commissioners have exceeded their powers under the Act, because we are of opinion that section 116 of the Act is not applicable to the facts of the present case. In construing the Act so far as it invests the Municipal Commissioners with power to tax the subject, we think we must scrutinise its provisions very closely and construe them with the utmost strictness.

Now, the tax which the Municipal Commissioners of Barisal are authorized to impose is "a tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality," as mentioned in clause (*a*) of section 85. The manner in which the tax is to be assessed is prescribed in sections 87 to 95; and it is sufficient to point out here that those sections provide for a number of cases in which persons, although occupying holdings within the Municipality are declared to be not liable to, or may be exempted from, the tax.

Thus under section 87 the tax is not to be levied on any person in respect of the occupation of arable lands (which is a beneficial occupation) or of buildings used exclusively as places of public worship. By section 91 the Commissioners are empowered to exempt from assessment any person who may by them be deemed too poor to pay the tax, but the name of such person, if the occupier of a holding, must be included in the assessment list, even though he may be exempted. Section 92, again, authorises exemption from liability to pay the tax in certain circumstances.

Section 112 provides for the publication of notice of assessment; and then section 113 runs as follows:—"Any person who is dissatisfied with the amount assessed upon him, or with the valuation or rating of any holding, or who disputes his occupation of any holding, or his liability to be assessed or rated, may apply to the Commissioners to review the amount of assessment, valuation, or rating, or to exempt him from the assessment or rate."

1894

DWARKA NATH DUTT v. ADDYA SUNDARI MITTRA.

This section, as it seems to us, provides for an appeal from the assessment as prepared under the orders of the Chairman in three cases—

first, (confining ourselves to the tax in question) by a person dissatisfied with the amount assessed upon him;

secondly, by a person who disputes his occupation of any holding; and

thirdly, by a person who (being the occupier of a holding) disputes his liability to be assessed.

Unless we read in the words "being the occupier of a holding," the second of the three clauses is redundant and unnecessary.

Section 114 then provides for the hearing and disposal of applications made under section 113 by not less than three Commissioners, and the last clause declares that the decision of such Commissioners, or of a majority thereof, in such cases shall be "final,"—final, that is to say, as between the applicant and the Commissioners, no further appeal being allowed to the entire body of Commissioners or to any other authority. It is not contended that this clause, if it stood alone, would bar the interference of the Courts.

Section 116, upon which the appellant relies, runs as follows :—

"No objection shall be taken to any assessment or rating, nor shall the liability of any person to be assessed or rated be questioned, in any other manner or by any other authority than in this Act is provided."

This section appears to us to apply to two only out of the three cases mentioned in section 113; that is to say, to the first and the third. It purports to make the decision of the Commissioners conclusive as regards the amount of assessment and the liability to assessment. But it does not say that the decision of the Commissioners in a dispute regarding the occupation of a holding may not be questioned otherwise than is provided by the Act. It is contended that the words "liability of any person" are wide enough to include a question of liability based upon occupation. But we are of opinion that it was not intended, and that it would be unreasonable, to attach this wide signification to the word "liability." In our opinion section 116 must be read with reference

to section 113, and the word "liability" must have the same restricted meaning given to it in section 116 as in section 113, where one portion of the section shows that the Legislature was dealing with the liability of an occupier, and not with the question of the occupancy, to which question another part of the section applies; that is to say, it must mean the *liability of any person being the occupier of a holding*, regard being had to the provisions for exemption from liability contained in sections 87 to 95. In other words, it means a liability apart from the question of occupation, and where the section says that the liability of any person to be assessed shall not be questioned otherwise than is provided in the Act itself, the meaning would seem to be that the decision of the Commissioners is to be conclusive as to whether a person who is the occupier of a holding is entitled to be exempted from the tax under any of the provisions of the Act. This we think, is clear from section 87, which only empowers the Municipal Commissioners to tax persons who occupy holdings within the Municipality; from sections 87 to 95, which contain references to persons who, though occupying holdings, are declared to be not liable to, and may be exempted from, the tax; and more especially from section 113 which refers in so many words to disputes regarding occupation as distinct and something other than disputes regarding liability. It may well be, and in truth it is very proper, that disputes as to occupation should in the first instance be heard and determined by the Commissioners, but all that the aggrieved person can do is to apply to be exempted, and all that the Commissioners can do is to decide upon his application to be exempted. This decision may involve a finding that a person occupies a holding within the Municipality, but it can never have been intended that this finding should not be open to challenge, and that the Commissioners should be at liberty to declare a person liable to the tax on the ground that he occupies a holding which in truth he does not hold, and that that person should have no means of redress.

It seems to us, therefore, that section 116 has no application to a dispute as to whether a person assessed to the tax does or does not occupy a holding, and that there is therefore no bar to the cognizance of the present suit by the Civil Courts.

1894

DWARKA NATH DUTT v. ADDYA SUNDARI MITTRA.

That being so, it is unnecessary to go into the larger question whether section 116 is sufficiently stringent in its terms to bar the interference of the Courts of Justice in cases in which the Municipal Commissioners may have exceeded their powers under the Act or acted illegally or without jurisdiction. The appeal is dismissed with costs.

Appeal dismissed.

T. A. P.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1893 *Nov.* 22.

ISHAN CHANDRA CHANDRA AND TWO OTHERS *v.* QUEEN-EMPRESS.*

Stolen property—Dishonestly retaining stolen property—Penal Code, s. 411*—Legal presumptions—Accomplice—Informer cognizant of offence—Omitting to disclose commission of offence.*

Where a document, purporting to be a Collectorate notice forming part of a record and found by the Court to be genuine, was discovered to be in the possession of persons charged with retaining stolen property, it was held that, in a matter of this kind, it was right to raise legal presumptions arising out of the ordinary course of business and to dispense with direct evidence of the document having been actually on the record or stolen from it. Though it be true that, before a man can be convicted of receiving stolen property, knowing it to be stolen, it must be shown that property has been stolen, *held*, that the disappearance of the document from the record, *plus* the substitution of an imitation of it in its place, showed that it must have been taken with a dishonest object.

Where an informer was, upon his own statement, cognizant of the commission of an offence, and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice; but held that his testimony was not such as to justify a conviction except where it was corroborated.

IN this case four persons, including the three appellants, were charged at the Midnapore Sessions with the following offences under the Penal Code, *viz.*:—Ishan Chandra Chandra and Koilash Chandra Maiti, the first two accused, under sections 466, 474,

* Criminal Appeal No. 866 of 1893 against the order of J. Pratt, Esq., Sessions Judge of Midnapore, dated the 10th October 1893.

and 193 in respect of a document purporting to be a Collectorate notice, marked as exhibit L, and alleged to be forged, and under section 411 in respect of a similar document, marked as exhibit A, and alleged to be genuine. They were also charged under section 473 in respect of two chalk seals having no connection with either of the above documents, and this charge was subsequently struck out by the Sessions Judge. The third appellant, Boikanta Nath Das, was charged under sections 466, 471 and 193 in respect of exhibit L, and under section 380 coupled with section 109 in respect of exhibit A.

The fourth accused, who was charged under section 466 coupled with section 109, section 471 coupled with section 109, section 193, and section 380, was acquitted of all the charges.

The Sessions Judge, agreeing with the assessors, convicted Ishan Chandra Chandra and Koilash Chandra Maiti under section 411 of the Penal Code for having retained the notice exhibit A (which was alleged to be stolen from the Collector's record-room), knowing, or having reason to believe, that the same was stolen, and sentenced each of them to three years' rigorous imprisonment, and Koilash Chandra Maiti further to a fine of Rs. 300, or, in default, to rigorous imprisonment for a further term of six months. The Judge also, concurring with the assessors, convicted Koilash Chandra Maiti and Boikanta Nath Das under section 474, Penal Code, for having in their possession the document exhibit L knowing the same to be forged and intending that the same should be fraudulently or dishonestly used as genuine, and sentenced Koilash Chandra Maiti to one year's rigorous imprisonment and Boikanta Nath Das to three years' rigorous imprisonment and to a fine of Rs. 300, or, in default, to rigorous imprisonment for a further term of six months.

The Court, further concurring with the assessors, found the first three accused not guilty of the remaining charges, and the fourth accused not guilty of any of the charges, and discharged him.

The facts sought to be established by the evidence for the prosecution, and which were set forth at length in the judgment of the Sessions Judge, were that a civil suit had been instituted against the father of the second accused and the third accused,

1893

ISHAN CHANDRA CHANDRA v. QUEEN-EMPRESS.

by one Rajnarain Maiti in conjunction with two others, the daughters of one Kristo Priya, their deceased mother; that the suit was for recovery of certain property alleged to have belonged to the deceased Kristo Priya, and of which the father of the second accused had taken wrongful possession; that one of the pleas raised in the written statement in that suit of the accused was that the suit was barred by limitation by reason of its having been brought more than twelve years after the death of the said Kristo Priya; that with the object of fabricating documentary evidence to support this plea, exhibit L had been forged and placed on the record of a land registration case through the intervention of the fourth accused, a mohurrir in the collectorate; that exhibit A was the genuine notice for which exhibit L had been substituted, and that it had been previously stolen from the record through the same agency. The facts which were undisputed were that exhibit A was found in a box in the house of Ishan, the first accused, in which Koilash, the second accused, was also residing; that Boikanto, the third accused, had applied for and obtained a certified copy of exhibit L from the Collectorate; and that exhibit L contained a statement to the effect that Kristo Priya was dead at the time of the service of the notice, that is, more than 12 years before the institution of the suit abovementioned

Against the conviction and sentence an appeal was preferred to the High Court by the first three accused.

Mr. *J. T. Woodroffe* (with him Mr. *W. R. Donogh* for the first two appellants).

Mr. *P. L. Roy* and Babu *Girish Chunder Chowdhry* for the third appellant.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

Mr. *Woodroffe*.—The evidence adduced to establish the genuineness of exhibit A is wholly insufficient. There are no less than ninety-six signatures endorsed on the document, and out of these ninety-six persons only two have been called to prove the genuineness of their signatures, and of these two one is the plaintiff in the civil suit, and therefore a deeply interested witness,

and the other is a dependant of his. Such evidence cannot be relied on. But, assuming that exhibit A is genuine, there is no evidence at all that it ever was on the record. Even assuming it was a document which ought to have been on the record, there is no evidence that it was stolen. In order to establish a charge under section 411 of the Penal Code it must first be established that the property was stolen, and secondly that the prisoners retained it dishonestly, knowing or having reason to believe it to be stolen, and this must be proved as satisfactorily as if the person charged with theft were on his trial: see *Queen-Empress* v. *Burke* (1), *Queen-Empress* v. *Balya Somya* (2), also Mayne's Commentary on the Penal Code under section 411. In this case the only person who was charged with the theft of the document has been unanimously acquitted by the Sessions Judge and the assessors: see also *Queen* v. *Bajo Huri* (3) and *In the matter of the petition of Yar Ali* (4). If this document was ever on the record there is no evidence to show when it left the record. It might have been ten years ago; so there could be no presumption of guilt arising from recent possession, even assuming it to be stolen: see *Ina Sheikh* v. *Queen Empress* (5). It has further been held that in such a case there must be some proof that some other person than the accused had possession of the property before him. See *Ishan Muchi* v. *Queen-Empress* (6) and Russell on Crimes, Vol. 2, p. 483. Moreover, the possession of one accused would not constitute possession by all: see *Empress* v. *Malhari* (7). In order to establish a conviction under section 474 of the Penal Code, it must be proved in the first place that the document is a forged one, and secondly, that the defendants knew it to be forged: see *Queen-Empress* v. *Abaji Ram Chandra* (8). Here the evidence that exhibit L was forged is wholly insufficient, but assuming it to be forged there is no evidence to show that the prisoners knew it to be so.

The case rests mainly on the testimony of an informer, who, upon his own statement, was an accomplice. He admits that

(1) I. L. R., 6 All., 224.
(2) I. L. R., 15 Bom., 369.
(3) 19 W. R. Cr., 37.
(4) 13 W. R. Cr., 70.
(5) I. L. R., 11 Calc., 160.
(6) I. L. R., 15 Calc., 511.
(7) I. L. R., 6 Bom., 731.
(8) I. L. R., 16 Bom., 165.

1893

ISHAN CHANDRA CHANDRA v. QUEEN-EMPRESS.

after becoming cognizant of the crime he kept quiet about it for six days. He took no steps to prevent it, but assisted the others in instructing their pleader in the preparation of the written statement in the civil suit. He also admits having remarked that the forgery had been so well executed that detection was impossible. Such a person is an accomplice, and according to the usual rule his evidence should not be accepted except where corroborated in material particulars: see *Queen-Empress* v. *O'Hara* (1). Or at least his evidence must be regarded as no better than that of an accomplice: see *Queen* v. *Chando Chandalinee* (2). Both the assessors have stated it as their opinion that this informer's evidence "may be accepted only so far as it is corroborated by independent and unquestionable evidence," and the Sessions Judge concurs in their opinion, though he avoids calling him an accomplice. Further, the corroboration must be such as to fix the defendants individually with guilt, and there is no such corroboration to be found in the evidence: see *Reg.* v. *Farler* (3), and *Queen* v. *Mohesh Biswas* (4).

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown:—A person in order to be an accomplice must have taken part in the offence. He must aid and abet within the meaning of section 107 of the Penal Code, and not merely take no steps to prevent the offence. The complainant here was not aiding, but frustrating. A man cannot be both aiding and plotting against. See Forster's Crown Cases, page 350, section 5, where "accomplice" is defined. Mere silence would not render a man an accomplice. This is clear from the judgment in *Queen-Empress* v. *O'Hara* (1) at page 665 of the report. The finding of exhibit A in Ishan's box is the strongest corroboration of his evidence. Ishan was Koilash's servant, and a servant's possession is a master's possession. [TREVELYAN, J.—If the peon Darastulla had been examined he could have clinched the matter. He could have said how he served Kristo Priya. Both exhibits A and L state that a separate return was filed by the peon. That is not produced.] Darastulla could have had no memory as to an event which took

(1) I. L. R., 17 Calc., 642.
(2) 24 W. R. Cr., 55.
(3) 8 C. and P., 106.
(4) 19 W. R. Cr., 16.

place twelve years ago. It is impossible to have evidence to show that exhibit A was on the record. Assuming exhibit A to be genuine, it must have been on the record. A must have been removed and copied and L substituted for it, because L is found on the record afterwards. A was useless to anybody's case, while there was reason to forge L, but none to forge A. It is not to be supposed therefore that A is forged.

Then as to A being stolen, direct evidence of theft is impossible. No one could be honestly in possession of it. The *onus* is upon the accused to account for possession. See Roscoe's Digest of the Law of Evidence in Criminal Cases, 10th ed., p. 19, as to presumption of guilt arising from possession of stolen property. It is incumbent on the accused to show that he came by the document honestly. The decision in *Ishan Muchi* v. *Queen-Empress* (1) conflicts with the Evidence Act, section 114, illustration (*a*).

Mr. *Woodroffe* was heard in reply.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

It is unnecessary for us to enter into the details of the history of this case. The judgment of the learned Sessions Judge has accurately narrated the circumstances which led to the present enquiry. There can be no doubt but that one of the most skilful and impudent forgeries ever committed has been perpetrated. It is for us to ascertain whether on the evidence any offence has been brought home to the present accused.

The questions argued before us, and those which we have to determine, are as follows:—1. Is exhibit A a genuine document? 2. Is exhibit L a forgery? 3. If A is genuine, was it ever on the collectorate record referred to in this case? 4. If A is genuine, and was on such collectorate record, was it stolen therefrom?

5. Have the accused or any of them committed any offence in respect of these documents?

The learned Sessions Judge and the assessors have come to the conclusion that exhibit A is a genuine document. Much argument

(1) I. L. R., 15 Calc., 511.

1893

ISHAN CHANDRA CHANDRA v. QUEEN-EMPRESS.

on this subject has been addressed to us. Mr. Woodroffe for the appellant has relied upon the inability of Shama Churn Maiti, the Naib Nazir of the Midnapore Collectorate, to determine whether the writing purporting to be his on A or that on L is his writing.

If a forgery be a good one, an exact copy be made of handwriting, it is impossible for any one to swear from the handwriting as to whether a document is genuine. This question must be determined from evidence and circumstances.

As Shama Churn Maiti proves, and as there can be no doubt, one of these documents is a forgery, if they are not both forgeries. Shama Churn's handwriting is the same in both. He can detect no difference. It is very improbable that both A and L are forgeries. There must have been in the ordinary course a genuine "*Gach*" summons filed, and the service recorded on it.

There is direct evidence as to the genuineness of A. Nityanand Maiti distinctly swears to A being the notice served upon him, and to L not having been served upon him. This witness is quite independent of the prosecution. If anything, his interest would be to shield the accused, as he is a near relation of one of them (Koilash), and lives in the same homestead with him. Doubt is sought to be thrown on his testimony in this respect by his evidence as to other handwriting. On examination, we do not think there is anything in the cross-examination of this witness as to handwriting which detracts from the value of his testimony as to his own writing; besides it is clear from this witness' evidence that Kristo Priya died at the time alleged by the prosecution. This witness lived in the same homestead with her, was present at her death, and was present at her cremation. Throughout the case there is no real suggestion that she died at any other time. This witness is apparently ignorant as to the dates of the deaths of some others of his relations, but it does not appear that he was living with them or was present at their death. Again there is no doubt whatever but that A was found in Ishan's box. That is not disputed before us. It is preposterous to suppose that it was put there by Rajnarain, or by any person interested with him or on his behalf.

It would not have been the interest of any one except the plaintiffs in the suit to forge A. It was a document which

not only would not support the defendants' case, but might be used against them, as it would distinctly show that their allegations as to the death of Kristo Priya was false. These considerations, we think, strongly support the direct evidence, even if they would not be sufficient without it. Mr. Price's name and the Collectorate seal would be evidence of the genuineness of the document if they stood by themselves, but those are both to be found on L. Whether viewed as a question of the competition for genuineness between A and L, or on the evidence applicable to A only, we think that the Court below was right in holding that A is a genuine document. It follows that L is a forgery.

The next question is whether A was ever on the Collectorate record. We think that the determination of the question as to the genuineness of A practically determines this question also.

It does not follow by any means that any one could speak to a document like this having been on the record. In the ordinary course it would be on the record. The case would not be determined unless it had been filed, and on the document itself appear endorsements which could only have been made on its being brought back to the nazir after service. This would show that it must have been on the record.

Again the fact that we find the forged document exhibit L on the record, would lead one to suppose that it had been substituted for the genuine document. In a matter of this kind it is right to raise legal presumptions arising out of the ordinary course of business. Apart from any such presumption, the fact that it came back to the nazir's office is apparent from the endorsement. It appears to have issued from the Collectorate, and to have gone back there.

The next question is whether A was stolen from the Collectorate. It is difficult to imagine how it can have legitimately found its way from the Collectorate records into Ishan's box, *i.e.* into the box of a person whose employer was interested in suppressing it. It has been argued, and rightly so, that before a man can be convicted of receiving property knowing it to be stolen, it must be shown that property has been stolen. The disappearance of the document from the record plus the

1893

ISHEN CHANDRA CHANDRA v. QUEEN-EMPRESS.

substitution of an imitation of it in its place, shows that it must have been taken with a dishonest object, and shows this as conclusively as can be.

The remaining question is the most important one. We agree with the learned Sessions Judge in thinking that it would be unsafe to act in this case on the unsupported evidence of Gooroo Pershad. We are not prepared to say that he was an accomplice. He may have been one, but it would be impossible to say in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it, and omitted to disclose it for six days. From any point of view, we do not think that his testimony is such as to justify a conviction, except where he is corroborated. There is no doubt that he is most amply corroborated with regard to Ishan. The fact that exhibit A was found in Ishan's box is a very strong circumstance against him. He has never attempted to explain this.

It is said that it is not shown that he acted dishonestly. Here a document having an important bearing on the case of his employer in the civil suit is found in his box after having been stolen from the record room of the Collectorate; it is difficult to conceive how his intention can have been otherwise than dishonest.

Besides, there arises the ordinary presumption as to property recently stolen. Having regard to the substitution of L, which can only have been effected for the purpose of making evidence in the suit, it is a legitimate inference that the substitution was made after the service of the summons in the suit. As the suit was filed on the 20th of April, and A was found with Ishan on the 9th of July, A may be said to have been recently stolen at the time it was found.

The case as against the others is different. Girish Chandra Mitter, whose evidence is unimpeached, proves that Koilash and Boikanta Nath with Ishan and Gooroo Pershad gave instructions for the written statement.

Boikanta and Ishan first gave him instructions, and as to this he is positive. The written statement contains the untrue statement to support which L was substituted for A. Soon after the day on which Gooroo Pershad says that Boikanta took away the

notice, *i.e.* L, we find Boikanta Nath making an application for a copy of L He and Koilash take this copy to the pleader, and Boikanta reads it out to the pleader. Boikanta before the Magistrate says that he got the copy at the instance of Gooroo Pershad, and that Gooroo Pershad paid the costs. This is absurd, and is inconsistent with his showing it to the pleader.

Koilash declined to say anything to the Magistrate as to the documents. We think that the action of Koilash and Boikanta Nath with regard to the written statement and the procuring of the copy of L makes it clear that they were cognizant of the substitution of L for A, and corroborates the story told by Gooroo Pershad as to the parts taken by these persons in the perpetration of the crime.

So far as Koilash is concerned, there is also the fact that he was Ishan's employer and must have known what was going on. This by itself would be worth little, but taken with regard to the other circumstance, it may well be considered.

We dismiss the appeals of all the accused.

J. V. W. *Appeals dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

GANGA CHARAN SINGH (PETITIONER) *v.* QUEEN-EMPRESS (OPPOSITE PARTY).*

1893 *Dec.* 21.

Escape from lawful custody—Penal Code (Act XLV of 1860), *s.* 224.

An offence was committed in 1866. In 1893 a person of the same name as the offender was arrested, tried, and acquitted. Whilst under arrest the accused escaped from custody. *Held* that he was not liable to conviction under s. 224 of the Penal Code. An escape from custody when such detention is not for an offence is not punishable under that section.

THE facts of this case were as follows:—

An offence was committed in 1866 by one Ganga Charan Singh, and a warrant was issued for his arrest. The offender, however,

* Criminal Revision, No. 694 of 1893, against the order passed by S. J. Douglas, Sessions Judge of Tipperah, dated the 10th of October 1893, affirming the order passed by Babu Khetro Gopal Roy, Deputy Magistrate of Comilla, dated the 16th September 1893.

1893

GANGA CHARAN SINGH v. QUEEN-EMPRESS.

was never arrested or brought to trial. On the 16th of August 1893 a person of the name of Ganga Charan Singh was arrested by the police who suspected that he was the Ganga Charan Sing who had committed the offence in 1866. He managed to make his escape from custody, but was re-arrested and brought up before the Deputy Magistrate of Comilla, when he was acquitted on the ground that he was not the person who was charged with the offence committed in 1866, but was a person bearing the same name as the person accused. Subsequently the accused was tried and convicted under s. 224, Penal Code, by the Deputy Magistrate of Comilla, and was sentenced to two months' rigorous imprisonment and to pay a fine of Rs. 25 for escaping from lawful custody. The accused appealed to the Sessions Judge of the district, but he upheld the conviction and sentence.

From that decision the accused petitioned the High Court for the exercise of its powers of revision.

Mr. *P. L. Roy* and Babu *Atulya Charan Bose* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

Mr. *Roy*:—The conviction is under s. 224, Penal Code. It is alleged that the petitioner escaped from lawful custody, but it is admitted by the Sessions Judge that he was arrested by mistake; that being so, he clearly had the right to resist such arrest. It may be that under s. 54 of the Code of Criminal Procedure the police have the right to arrest persons under the circumstances therein mentioned, and probably if an innocent person is arrested by mistake, but in good faith, that section might so far as the officer who makes the arrest is concerned be a sufficient answer to a charge of wrongful confinement, but ordinarily if a police officer were to arrest an innocent person, it would be at his peril.

Section 224 says that a person is not to offer any resistance or illegal obstruction to his *lawful* apprehension. The emphasis is on the word lawful. It cannot be contended that the arrest of a person who has not committed any offence is a lawful arrest. In Roscoe's Criminal Evidence, 11th edition, p. 453, it is laid down "that it must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence." Again, at

page 454, "The arrest must be justifiable, in order to render the escape criminal." If the law were otherwise, the consequences would be most serious to the community. In the present case the petitioner was arrested merely because another man of the same name was wanted for a trivial offence committed more than 20 years ago. It has been held in England that when a warrant is issued for the arrest of a person and without the warrant a police officer arrests the person and is assaulted whilst making the arrest, that such person cannot be convicted of an assault—*Codd* v. *Cobe* (1). In the case of *Empress* v. *Shasti Churn Napit* (2), it was held by Mitter and Maclean, JJ., that an escape from custody by a person who was being taken before a Magistrate for the purpose of being bound over to be of good behaviour is not punishable under s. 224, Penal Code, on the ground that he was not lawfully detained in custody for any offence. In the present case the petitioner was not lawfully taken into custody for any offence that he had committed, and therefore his escape was justifiable.

The *Deputy Legal Remembrancer* for the Crown:—All that is necessary to bring the present case under s. 224, Penal Code, is to show that the petitioner was charged with an offence, which, as a matter of fact, he was. It is true that when placed upon his trial he was acquitted, but that makes no difference to the offence. The fact that he was acquitted is immaterial. It is sufficient to show that he was arrested by a police officer under the provisions of s. 54, Criminal Procedure Code. It is clear that a person has not the right of private defence as against a police officer acting in the *bonâ fide* exercise of his duty, and if it is held that under s. 54 of the Criminal Procedure Code the arrest of the petitioner was lawful, it follows that the escape from the custody of such officer, after arrest, is an offence. [PRINSEP, J.—Would the arrest and custody of a person innocent of any offence be legal, having reference to the terms of s. 224, Penal Code?] Yes; s. 54, Criminal Procedure Code, lays down that a police officer may arrest on suspicion. It is not necessary that the person arrested should be guilty, but if the police officer was justified in arresting

(1) L. R., 1 Ex. D., 352. (2) I. L. R., 8 Calc., 331.

1893

GANGA CHARAN SINGH v. QUEEN-EMPRESS.

him, and the arrested person escape, he is guilty of an offence under s. 224.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

In this case the petitioner escaped from custody, after arrest by a police constable under the belief that he was a man who had been charged with an offence and could not be arrested on warrants issued. He was subsequently brought to trial, and was acquitted on the ground that he was not the person who was charged with that offence, but was another person bearing the same name as the person accused. The question raised before us is whether, under such circumstances, it could be properly said that he was lawfully detained for any offence so as to make him liable to punishment for his escape. In our opinion he is not liable to punishment under section 224, Penal Code, because he was not lawfully detained for any offence. Whether the police were or were not justified in arresting this man is a matter which does not concern the point raised before us. We accordingly set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

C. S.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

1893 *June 6.*

ROHNI SINGH AND OTHERS (PLAINTIFFS) *v.* J. HODDING, ADMINISTRATOR OF THE ESTATE OF THE LATE L. COSSERAT, AND ANOTHER (DEFENDANTS).*

Execution of decree—Execution pending appeal of decree set aside on appeal—Restitution of rights by motion, where the Appellate decree does not mention restitution—Civil Procedure Code (Act XIV of 1882), s. 583.

Where a decree made by a Court of the first instance is executed pending an appeal, and on appeal such decree is set aside, the appellant is entitled by motion to obtain restitution, even though the decree of the Court of Appeal is silent as to such restitution.

* Appeal from Order No. 334 of 1892, against the orders of Babu Anunta Ram Ghose, Subordinate Judge of Saran, dated 25th June, 13th July, and 13th and 27th of August 1892.

A, the owner of a 15 odd pie share of certain indigo land, brought a suit for partition against his cosharer *B*, the owner of the rest of the land, and obtained a decree, from which *B* appealed. *A* without waiting for the disposal of the appeal executed his decree and obtained possession of his share, settling it with tenants. The decree was subsequently set aside on *B's* appeal, but no order as to restitution was made in it. *Held*, on motion by *B*, that he was entitled to be put into the same position as before the partition was made (*i.e.*, joint possession with *A*) and to remove any tenants who refused to vacate.

THE facts in this case were as follows:—

The plaintiffs, Rohni Singh and others, now appellants, brought a suit in the Sub-Judge's Court at Chupra for partition and for recovery of *khas* possession of 94 out of 97 bighas of indigo *zerat* lands. The plaintiffs were owners of 15 annas odd pie and the defendants owned five pies odd. The plaintiffs obtained a decree on the 20th of September 1890, and the defendants appealed against that decree. The plaintiffs, without waiting for the disposal of the appeal, took out execution of the decree and caused the said lands to be partitioned by a Commissioner deputed by the Court. After confirmation of the said partition, the plaintiffs obtained *khas* possession of their partitioned share. Subsequently to the execution of the process of delivery of possession, the decree of the Subordinate Court was set aside by the High Court on the 1st September 1891. The defendants then filed a petition to be put into the same position as they were in before the partition decree was made: the plaintiffs made objections to the petition, stating that they had settled all the lands with tenants, and that the defendants could realize the rent of their share from the tenants. The plaintiffs' objections were disallowed, and they were ordered to put the defendants into exactly the same position as they were in before the partition proceedings were instituted.

From this order the plaintiffs appealed to the High Court.

The *Advocate-General* (Sir *Charles Paul*) and Babu *Jogesh Chunder Roy* for the appellants.

Sir *Griffith Evans*, Mr. *McNair*, Mr. *Geddes*, and Babu *Dwarkanath Chuckerbutty* for the respondents.

The *Advocate-General*:—Restitution cannot be granted unless there is an order for restitution in the decree. There is no decree

1893

ROHNI SINGH v. HODDING.

that can be executed and there is no judgment-debtor. The decree must say exactly what you are to get. Section 583 of the Civil Procedure Code says the benefit must be mentioned in the decree. The order for removal of the tenants is bad. Possession can be taken in two ways—by a regular suit for ejectment, by proclamation in execution of a decree. Here proclamation should be made that the defendants are the owners of a five-pie share in the 97 bighas of land. Tenants have been placed on the lands, and the defendants can get their five-pie share from the tenants. The plaintiffs had a right to put tenants on the land. What is the position of these tenants? Can they be turned out? If they are turned out they can come in again next day. The Court ought not to stultify itself in that way. Execution may be given by proclamation, and the respondent ought not to have more.

Sir *Griffith Evans* for the respondents:—As regards the first point, namely, that restitution cannot be granted unless there is an order for restitution in the decree, the whole of the authorities on the subject are collected under section 583, in the annotated editions of the Civil Procedure Code. Under the authorities restitution can be granted on motion. The order for removal of the tenants is not bad. We are entitled to be in as good a position as we were in before the partition decree was made—*Rogers* v. *Comptoir d'Escompte de Paris* (1). At present we are in a much worse position. The plaintiffs now are virtually the holders of the whole 16 annas, and they say our assignees will pay you part of the rent if you will let us hold the whole 16 annas. A man cannot place himself in a better position than he would have been in had the decree not been passed. The question is, are the respondents entitled to be put into the actual possession they had before the suit was brought or not? It is admitted that the respondents are five-pie sharers and they should obtain possession of that share.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

This is an appeal from an order of the Subordinate Judge of Chupra, dated the 25th of June 1892, whereby he directed that certain parties should get restitution and be entitled to be put

(1) L. R., 3 P. C., 465.

exactly in the same position they were in before the suit was brought. It appears that there are two classes of owners in this village—one of them, Mr. Hodding, has a five-pies odd share, and Rohni Singh and others are the owners of the 15 annas odd pie share. The owners of the 15 annas share brought a suit for partition of certain land against Hodding. That suit was decreed in the First Court, but on appeal, the suit was dismissed on the ground that no such suit would lie. After the dismissal of the suit Hodding applied in the Lower Court to be put in the same position as he was in before the suit was brought. In the meantime the owners of the 15 annas odd had taken out execution of the decree for partition and settled tenants upon it. Therefore, when the question of restitution arose, it became necessary to decide what was the position of Hodding in regard to these tenants. The learned Advocate-General has argued that under section 583 of the Code of Civil Procedure, restitution cannot be granted, by motion, unless there is an order for restitution in the decree. So far as we are aware, that is a proposition contrary to the settled practice of this Court and of the Bombay High Court, as well as of their Lordships of the Privy Council. Hodding has no doubt a right to be put exactly in the same position in which he was before, and neither more nor less; and therefore he is entitled to joint possession with the other owners; and no title taken *pendente lite* can prevent him from removing a tenant if he was not found on the land before the partition; or, in the words of section 263, he is entitled to have possession delivered over to him, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree, who refuses to vacate the property.

Now, we notice that in the Court below Hodding seems to have been under the impression that he has a right to cut the crops. We think no Court could accede to that.

Then, it is argued by the learned Advocate-General that it would be useless to pass the order asked for, because, although even if we remove any person who may have taken title to their land since the restitution of the suit, their 15 annas zamindar will be entitled immediately afterwards to bring them in. It is argued on the other side that that cannot be so. The rights of owners of lands

1893

ROHNI SINGH v. HODDING.

held jointly has been practically settled by the Privy Council in the case of *Watson & Co.* v. *Ram Chand Dutt* (1), and the subsequent case of *Lachmeswar Singh* v. *Manowar Hossein* (2), and whatever rights they possess according to law, of course they can claim. All we wish to say at present is that Hodding is entitled to get into joint possession with the 15 annas zamindar, and to remove such tenants as may refuse to vacate. We make no order as to costs.

C. S. *Appeal dismissed.*

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

1893 *July* 5.

MOHUN PERSHAD NARAIN SINGH AND ANOTHER, THROUGH HIS FATHER AND GUARDIAN, LUCHMI PERSHAD NARAIN SINGH (PETITIONERS), *v.* KISHEN KISHORE NARAIN SINGH (OBJECTOR).*

Hindu Law—Stridhan—Mithila Law—Succession—Letters of administration.

The husband's sister's sons are preferential heirs to the husband's paternal great-grandfather's great-grandsons in the succession to *stridhan* property.

In an application for letters of administration, *held*, on the evidence, that the deceased left property to which administration could be granted without finally determining the title to such property.

THE petitioners applied to the District Judge of Mozufferpore for a grant to them of letters of administration to the estate of a lady named Punit Koer, who died at Mozufferpore on the 3rd of December 1890. They filed their application on the 19th of September 1891. In their petition they stated that Punit Koer died, leaving the petitioners, her husband's sister's sons, her heirs to her *stridhan* under the Mithila school of Hindu law. The petition further set out that the deceased left her surviving one Malikrani Koer, her husband's stepmother, and Awadh Behari Narain Singh, Janki Pershad Narain Singh, and Kishen Kishore Narain Singh, her husband's paternal great-grandfather's great-grandsons, and Kishen Buldeo Narain Sing, her brother's son; but the petitioners submitted that they were preferential heirs to the *stridhan* property,

* Appeal from Original Decree No. 97 of 1892, against the decree of W. H. Page, Esq., District Judge of Tirhut, dated the 6th of April 1892.

(1) I. L. R., 18 Calc. 10; L. R., 17 I. A., 110.

(2) I. L. R., 19 Calc., 253; L. R., 19 I. A.., 48.

of which a list was set out, of the deceased. A caveat was entered on the 21st of September 1891 on behalf of Awadh Behari Narain Singh, Janki Pershad Narain Singh, and Kishen Kishore Narain Singh. The questions dealt with by the District Judge were two—1st, Was the property *stridhan?* 2nd, if so, who were the heirs? He decided that Punit Koer left no *stridhan* property, and that as she therefore had no estate, no administration could be given. He did not, however, decide the second point.

The applicants then appealed to the High Court.

Mr. *W. C. Bonnerjee*, Moulvi *Mahomed Yusuff*, Babu *Golap Chunder Sarkar*, and Babu *Okhoy Koomar Bannerjee* for the appellants.

Sir *Griffith Evans*, Babu *Saroda Churn Mitter*, and Babu *Degumber Chatterjee* for the respondent.

Babu *Golap Chunder Sarkar*:—In this case the parties are governed by the Mithila school of Hindu law, and according to the Mithila school a woman's husband's sister's son is entitled to inherit her *stridhan* property in preference to the husband's paternal great-grandfather's great-grandsons in the male line. The rule laid down in the Mitakshara on the subject is that "in default of a woman's issue by the body her estate goes to her husband and his *sapindas*." See Mitakshara, Chapter II, section XI, paragraphs 9—11. But the Vinadaratnakara, the authority for Mithila law, cites the text of Vrihaspati, which is not cited in the Mitakshara but is cited in the Viramitroyda, page 243, which enumerates by implication the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother as heirs to a woman's property. Mayne has misunderstood the meaning of the texts as regards the relations implied by it. The aforesaid relations enumerated in Vrihaspati's text are entitled to inherit in preference to those who come under the general term "husband's kinsmen" in the Mitakshara. See *Sree Narain Rai* v. *Bhya Jha* (1), *Bachha Jha* v. *Jugmon Jha* (2), *Ranjit Singh* v. *Jagannath Prosad Gupta* (3).

Babu *Saroda Charn Mitter* for the respondent:—It is clear on the evidence that the lady had no property which can be

(1) 2 Sel. Rep., (O.) 23, (N.) 29 (35). (2) I. L. R., 12 Calc., 348.
(3) I. L. R., 12 Calc., 375.

1893

MOHUN PERSHAD NARAIN SINGH v. KISHEN KISHORE NARAIN SINGH.

characterised as *stridhan*, therefore no administration ought to be granted, as there is no property to administer. The *sapindas* are not postponed to the sister's son and the husband's sister's son. The case of *Bachha Jha* v. *Jugmon Jha* (1) is opposed to the contention put forward on behalf of the appellants. Mayne treats the text of Vrihaspati quite differently from the view of it taken by the other side. Mayne says that they do not take in the order there stated. No authority is quoted to show that Mayne is wrong. Mayne's Hindu Law, 5th ed., para. 623.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

This is an appeal from the decision of the District Judge of Tirhut, refusing to grant letters of administration to the appellants.

The appellants state that Punit Koer, who died on the 3rd of December 1890, at Mozufferpore, had left moveable and immoveable property in the nature of *stridhan*, and applied to be allowed to administer the estate.

In answer, it was stated that the lady left no property as *stridhan*, that the property was really her husband's, who was the last full owner; and even if she had any property, still the applicants, not being the next heirs, ought not to get administration.

On the case coming on before the Judge in the Court below, two points of the nature already stated were raised for decision—(1) Was the property *stridhan*? (2) If so, who are the heirs?

The Judge came to the conclusion that the lady had no *stridhan*, and as she had no estate, no administration could be given. He did not decide the second point. The facts of the case are as follows:—One Ram Gobind Singh held property jointly with others. In 1863, he applied for the partition of the property. The partition proceedings commenced in 1864, and were completed in August 1866. Somewhere about November 1864, he gave 19 gundas of Rajkhund and of Sarkhand Bhitto to Punit Koer. That lady and Ram Gobind both applied for partition, and in the application Ram Gobind stated that he was all along in possession. The partition was made in March 1866, the usual papers showing the definite shares allotted to each were made out, and the parties

(1) I. L. R., 12 Calc., 348.

were placed in possession of their shares in the usual way. Sometime after Ram Gobind died. We do not know the exact date, that is to say, whether it was in 1868 or 1869. In 1877 the lady, who up to that time had been only entered in the *batwara* register, and in the register in existence before 1876 in the Collectorate, applied and had the estate of Sarkhand, &c., which formed the 19 gundas, registered in her name, she being described as the owner. In the same year she also applied and succeeded in having her name entered as owner of the property 1 anna 1 gunda, not by gift, as the 19 gundas, but by inheritance. Therefore, we find that, so far as the 19 gundas are concerned, we have it stated, so far back as 1864, that she was in possession. It also appears that she was given possession under the *batwara;* and in the subsequent proceedings and dealings with the property she is described as in possession; so that up to 1890, that is, for a period of nearly 26 years, the ostensible title is in the lady, so far as the 19 gundas are concerned.

It has been argued on behalf of the respondent in this Court, that, although it is impossible to contest the fact that the lady was the ostensible owner of the property, still she was never in possession, and no gift was ever made to her; and in support of that contention the evidence of a person who was at one time *dewan* is relied upon. He states that although the *jamabandi* accounts were separate, the collections were joint; and the property was in Ram Gobind's name. Again, there is an entry in her petition, filed in 1877, to get the registration of her name, that she obtained possession of the property on a certain date; and that date is undoubtedly the date of her husband's death. But if we read it in conjunction with the remarks under the 11th head of that petition, it seems quite clear that she contended that she had been in possession on the date of the partition. On the other hand, there is the evidence of another individual who also was undoubtedly an officer under her husband, and of a ryot and a patwari. Their evidence goes to show that the lady had all along held these properties as separate and has dealt with them as her own. It thus appears that for a long period the ostensible title is in the lady. We think the respondent has not shown to us that the estate comprising 19 gundas which she claimed to have received

1893

MOHUN PERSHAD NARAIN SINGH v. KISHEN KISHORE NARAIN SINGH.

from her husband, so far back as 1864, did not really belong to her as owner, but formed part of her husband's estate. Moreover, it appears from the schedule of the properties filed with the application, that some of the moveables and ornaments must belong to the lady. Ram Gobind died so far back as 1868; and the only reasonable conclusion we can come to is, that these ornaments and garments really did belong to the lady.

Now, although we have come to the conclusion, for the purposes of the present suit, that the lady has an estate to administer, we wish carefully to guard ourselves from being understood to attempt finally to determine either the nature or the extent of her estate.

The next point raised is in regard to the right of being heir or successor to the lady's *stridhan*. She belongs to a family governed by the Hindu law of the Mithila school. So far back as the year 1812, in the case *Sree Narain Rai* v. *Bhya Jha* (1), the Pundits of the Sudder Dewany Adawlut gave their *vyavasthas* as follows:—"Supposing that the Rani did not appoint Bhya Jha her adopted son, he would not inherit her *stridhan*; the son of the mother's brother not being one of the legal heirs to her peculiar property. If the Rani left a brother, sister, sister's son, husband's sister's son, husband's brother's son, brother's son or son-in-law, any such person is entitled to succeed to the *stridhan*. If she left none of these, Sri Narain and Lullut Narain, the nearest *sapindas* of her husband, are entitled to her peculiar property as well as the Rajah's estate." In dealing with the subject of "peculiar property" under the Mithila school of Hindu law in 1878, Mr. Justice Banerjee stated that, after the husband or the parents, the heirs would be those mentioned by Vrihaspati. After them "the order of succession would be the same as that according to the Dravida school." According to Vrihaspati, on failure of heirs down to her husband, a woman's property goes as provided in the following text:—"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their body, nor daughter's son, nor his son, then the sister's son and the rest shall take their property." By "sister's son and the rest" is meant those

(1) 2 Sel. Rep. (O.) 23, (N.) 29.

persons who are in the same category as the sister's son, that is to say, husband's brother's son, husband's sister's son and others. That seems also to have been the view taken by the Pundits in the case of *Sree Narain Rai* v. *Bhya Jha* (1), and by Mr. Justice Banerjee in his Tagore Lectures of 1878, where he says that "the group of heirs given in Vrihaspati's text, *i e*, 'the sister's son,' 'the husband's sister's son,' &c., are entitled to inherit." Then it is argued that whatever may have been the opinion up to 1878, still there is no direct decision upon the point. The question is still open, and it is further asserted that the case of *Bachha Jha* v. *Jugmon Jha* (2) is entirely opposed to that opinion. According to that decision, the respondents argued that the *sapindas* are not postponed to the sister's son and the husband's sister's son. But it seems to us that that case is in no way antagonistic to the opinion we have expressed. In that case it is admitted that the husband's brother's son and the husband's sister's son were the heirs. It was even pointed out at page 354 of the report that, according to a book which is of some importance in the Mithila school, the sister's son took the peculiar property; what was decided in that case was not whether the class of sister's sons came before or after them, but whether the husband's brother's son took prior to the sister's son, both being of the same class. We can find nothing in that judgment which could support the present contention. Indeed, the case proceeded upon the assumption that the sister's son took before the husband's *sapindas*. During the discussion of the case it was asked whether the husband's brother's son or the *sapindas* took first. It was not controverted that in that case the husband's brother's son would succeed.

Looking, therefore, to the circumstances of the case, we think we ought to allow this appeal. The decision of the Lower Court must accordingly be set aside; and we direct that letters of administration do issue to the applicant, upon his putting in the usual security to the satisfaction of the Lower Court.

The appellants are entitled to costs.

C. S. *Appeal allowed.*

(1) 2 Sel. Rep. (O.) 23, (N.) 29 (34). (2) I. L R., 12 Calc., 348.

Before Mr. Justice Beverley and Mr. Justice Hill.

1893
Dec. 12.

PULIN CHANDRA ROY (PLAINTIFF) *v.* AKBAR HOSSEIN (DEFENDANT).*

Public Demands Recovery Act (Bengal Act VII of 1880), *s.* 2—*Bengal Act VII of* 1868, *s.* 8—*Certificate of sale—Evidence of sufficiency of service of notice of sale—Construction of Act.*

Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1880), which enacts that that "Act, so far as is consistent with the tenor thereof, shall be construed as one with Act XI of 1859 and Bengal Act VII of 1868," does not extend the effect of s. 8 of Bengal Act VII of 1868 to a sale certificate granted under section 19 of Bengal Act VII of 1880, so as to make such a certificate conclusive evidence of the sufficiency of the service of the notices of sale under the last-named Act (1).

THE defendant was the owner of 152 bighas 3 cottahs 10 gundas of *lakhiraj* land in *mouzah* Baradaha, and having failed to pay the road and public works cesses on the land, a certificate was, on the 19th February 1889, filed for the recovery of the cesses due, and on 3rd March a notice was issued against him under section 10 of the Bengal Act VII of 1880, the Public Demands Recovery Act: and whilst the lands were under attachment, on the 11th March 1889, the defendant sold by a *kobala* of that date to the plaintiff 38 bighas 9½ cottahs of the said land for Rs. 166, on the condition that if the sale became void from any cause, the plaintiff should get back the purchase money with interest. The *kobala* was registered on the 11th July 1889, but the plaintiff never got possession of the land sold to him under it. On the 15th August, after service of the usual notice of sale, the defendant's land was sold by the Collector and purchased for Rs. 250 by third

* Appeal from Appellate Decree No. 609 of 1892, against the decree of H. Beveridge, Esq., Officiating Judge of Murshidabad, dated the 13th of January 1892, modifying the decree of Babu Debendra Chandra Mukerjee, Munsif of Berhampur, dated the 17th of August 1891.

(1) In *Bhola Nath Maiti* v. *Mohinuddin Mahomed*, Appeal from Appellate Decree 985 of 1892, decided on 3rd January 1894 by TREVELYAN and BANERJEE, JJ., it was held that section 8 of Bengal Act VII of 1868 did not apply to a certificate granted under section 7 of Bengal Act VII of 1880, but only to the two descriptions of certificates mentioned in the former section.—*Rep. Note.*

persons who were put in possession. After deduction of the sum due for cesses, a balance remained of Rs. 208-12-8, which was drawn from the Collectorate by the defendant. The sale to the plaintiff having been made whilst the lands were under attachment by the Collector was invalid, and he was unable to recover the land he had bought. He therefore, alleging fraud by the defendant, in knowing of the attachment and selling the land concealing his knowledge, sued for the recovery of his purchase money, Rs. 166, and interest, Rs. 38-3, and for cancellation of the *kobala*. The defendant denied the fraud, and alleged that the plaintiff's loss, if any, had been caused by his own laches, as he might have protected the land from sale, but had not done so.

The Munsif give a decree for the plaintiff's claim in full, but on appeal by the defendant the amount of the decree was reduced to Rs. 53-4-6. The Judge found that the defendant had not been shown to have acted fraudulently, and that the sale under the certificate was vitiated by there not having been due service of notice on the defendant. He held, therefore, that the *kobala* could not be set aside, but that the plaintiff was entitled to a share of the sale proceeds drawn out by the defendant, and this share was the amount decreed.

From this decision the plaintiff appealed to the High Court.

Babu *Saroda Charan Mitter* for the appellant.

Moulvie *Serajul Islam* for the respondent.

The judgment of the Court (BEVERLEY and HILL, JJ.) was as follows:—

This was a suit for the cancellation of a deed of sale of certain immoveable property executed by the defendant to the plaintiff and for the recovery of the purchase money.

The defendant, it appears, was the owner of 152 bighas 3 cottahs and 10 gundas of *lakhiraj* land in *mouzah* Baradaha, and at the beginning of the year 1889 was in arrears in respect of the road cess assessed thereon to the amount of sum Rs. 41. On the 19th February 1889 a certificate for the recovery of those arrears was filed in the office of the Collector pursuant to the provisions of Bengal Act VII of 1880, and on the 3rd March this

1893

PULIN CHANDRA ROY v. AKBAR HOSSEIN.

was followed by the issue of a notice from the Collector's office to the defendant under the provisions of section 10 of the Act. On the 11th March the defendant conveyed to the plaintiff by a deed of sale of that date 38 bighas 9½ cottahs out of this property for Rs. 166, and by the deed it was agreed, *inter alia*, "that if the sale of the property hereby sold be not on any account valid. I" (that is, the defendant) "shall pay back the whole of the consideration money with interest." The purchase money was paid in due course, and on the 11th July 1889 the deed of sale was registered. On the 15th August the whole of the defendant's 152 bighas was sold under the certificate for a sum of Rs. 250 to a third party, to whom in due course a sale certificate was granted, and, on the 25th October following, the surplus proceeds of the sale, amounting after the deduction of the Government demand to Rs. 208-12-8, were withdrawn by the defendant from the Collectorate. The plaintiff, who is the appellant before us, contends that under these circumstances he is entitled to recover back from the defendant the sum of Rs. 166 paid by him as the consideration for the sale of the 11th March, and also to have that sale cancelled.

In the Court of first instance, where the plaintiff obtained the relief sought, as well as in the Lower Appellate Court, he grounded his claim in a measure upon the alleged fraud of the defendant in concealing from him the circumstances of the property at the time of the sale. With this view of the case, however, we are not now concerned. The learned District Judge has found against the plaintiff on the issue of fraud, and the question of the effect of the certificate proceedings upon the competency of the defendant to dispose of his property to the plaintiff is the only matter which now arises for determination.

In reference to this question the learned Judge has found that the notice issued under s. 10 of Bengal Act VII of 1880 never came to the knowledge of the defendant, and that in other respects the service was defective; and that in consequence it was not sufficient in law to carry with it the effects flowing from an attachment when the order has been duly intimated to the judgment-debtor under the provisions of s. 276 of the Code of Civil Procedure. He has accordingly held that the sale to the plaintiff was a good and valid sale, and has reversed the decree of the Court

of first instance in so far as it directed the cancellation of the sale and reduced the amount recoverable by the plaintiff to a share of the surplus proceeds of the Collectorate sale proportionate to his share of the property sold thereunder.

From this decree the plaintiff has appealed to this Court: and it has been urged on his behalf that the learned Judge was precluded by s. 8 of Bengal Act VII of 1868 from inquiring into the sufficiency of the service of the notice under s. 10 of the Act of 1880 upon the defendant, but was bound under the former section to treat the certificate of sale granted to the purchaser at the Collectorate sale as conclusive proof that that notice was duly served, and to find as a consequence that the plaintiff's purchase was void. It was further contended that the learned Judge ought, in any event, to have given the plaintiff a decree for an amount proportionate to his interest in the property in the gross sale proceeds of the Collectorate sale as distinguished from the surplus sale proceeds, the vendor being liable, under s. 55 of the Transfer of Property Act, to pay all public charges accrued due in respect of the property up to the date of the sale.

With the former of these contentions we are unable to agree. It is true that by s. 2 of the Act of 1880, it is provided that that Act shall, so far as is consistent with the tenor thereof, "be construed as one with Act XI of 1859 and Bengal Act VII of 1868. But the operation of s. 8 of the Act of 1868 is confined in express language to certificates of title given under s. 28 of Act XI of 1859 and s. 11 of the Act of 1868, while the certificate in the present instance was granted under the provisions of s. 19 of Bengal Act VII of 1880; in other words, under the Code of Civil Procedure, and however complete the union created between the enactments in question by s. 2 of the last-mentioned Act, we think an interpretation of that section which would extend the effect of s. 8 of the Act of 1868 to sale certificates granted under s. 19 of the Act of 1880, is not permissible.

In our opinion, therefore, it was open to the learned Judge to go into the question of the due service of the notice upon the defendant, and we agree with him in thinking that it was not a good service and that it was ineffectual in law to affect the validity of the sale to the plaintiff.

1893

PULIN CHANDRA ROY v. AKBAR HOSSEIN.

It comes to this, then, that the plaintiff's property was sold under the "certificate proceedings" to a third party, and that the proceeds of the sale have found their way into the defendant's hands. The plaintiff has chosen to affirm that sale, and what he is in our opinion entitled to, is to recover from the defendant the proceeds of the sale which have come into the hands of the latter; that is to say, a sum bearing to the Rs. 250 realized by the sale of the whole property under the certificate the proportion borne by 38 bighas 9½ cottahs to 152 bighas 3 cottahs and ½ chittack, and we decree accordingly. The liability for arrears of road cess was, in our opinion, personal to the defendant alone. Under all the circumstances of the case, we think it unnecessary to make any order as to costs.

J. V. W. *Decree varied.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *June* 22.

MAHOMED AZHAR (PLAINTIFF) *v.* RAJ CHUNDER ROY AND OTHERS (DEFENDANTS).*

Sale for arrears of revenue—Suit to set aside sale—Notice of sale, publication of—Act XI of 1859, *ss.* 5 *and* 7.

Where it was contended that a sale under Act XI of 1859 was bad on the ground that the notices prescribed by sections 5 and 7 of that Act were not published, *held*, that there being no subsisting attachment on the property at the time it was sold, omission to issue notice under section 5 did not vitiate the sale.

Held that, in the absence of proof that the plaintiff had sustained substantial injury on account of the omission to issue notice under section 7, such omission did not invalidate the sale.

THE plaintiff in this case sued to set aside a revenue sale, and recover possession of a share in a *khariji* taluk. The taluk was divided into two shares, one of 13 annas 8 gundas 3 cowries, and the other of 2 annas 11 gundas 1 cowri, and of these separate shares separate accounts were kept in the Collector's *towji*. The plaintiff was owner of 5 annas of the 13 annas 8 gundas 3 cowries share in the payment of the revenue of which default was made in January 1889, and the estate was sold by the Collector on 21st March 1889 under Act XI of 1859.

* Appeal from Original Decree No. 261 of 1891, against the decree of Babu Kali Churn Ghosal, Subordinate Judge of Mymensingh, dated the 24th of June 1891.

The defendants were the owners of the remaining 8 annas 8 gundas 3 cowries of the share of 13 annas 8 gundas 3 cowries sold. The Secretary of State was also made a party defendant to the suit.

The plaintiff applied to the Commissioner of Dacca to set aside the sale under section 33 of Act XI of 1859, but the application was refused.

The plaintiff sought by suit to set aside the sale on various grounds, those material to this report being that the notices required by the law (ss. 5 and 7 of Act XI of 1859) were not duly published, and that the estate was under attachment by order of a civil court at the time of the sale; that there was fraud by the defendants in the matter of the sale; and that consequently the property fetched an inadequate price by which the plaintiff sustained substantial injury.

The facts relating to the attachment which it was alleged subsisted on the estate at the time of sale are stated in the judgment of the High Court.

The Subordinate Judge held that the sale notices were duly served; that there was no subsisting attachment at the time of sale; and that no fraud had been established, and refused to set aside the sale.

From this decision the plaintiff appealed to the High Court.

Dr. *Troyluckya Nath Mitter*, Moulvi *Serajul Islam*, Babu *Joy Gopal Ghose*, and Moulvi *Shamsul Huda* for the appellant.

Dr. *Rash Behari Ghose* and Babu *Jogesh Chunder Roy* for the respondents.

Dr. *Troyluckya Nath Mitter*:—In this case the property sold was under attachment, and it is admitted that the provisions of section 5, Act XI of 1859, were not complied with. That by itself makes the sale bad. The ruling in *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1) is very clear on the point, that non-compliance with the provisions of section 5, Act XI of 1859, is an irregularity—*Gobind Lall Roy* v. *Biprodas Roy* (2). The effect of the order striking off the execution proceedings was not to remove the attachment. The Appellate Court could not, and did not, set aside the decree so far as it affected the debtor, who did not apply

(1) 12 B. L. R., 297; L. R., 1 I. A., 89.

(2) I. L. R., 17 Calc., 398.

1893

MAHOMED AZHAR v. RAJ CHUNDER ROY.

to have the decree set aside. Notices were not served under section 7 of the Act, which also makes the sale bad, and also taking into consideration that the price fetched was wholly inadequate, the sale should be set aside.

Babu *Jogesh Chunder Roy*, for the respondents:—Omission to serve notices under section 5 was an irregularity, and under section 33 of Act XI of 1859, it ought to have been made a ground of appeal before the Commissioner. When the case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1) was before the High Court, it was remanded for the trial of the issue "whether there was substantial injury owing to the non-compliance of the provisions of section 5," and the Judges would not have remanded the case if they considered the non-compliance of the provisions of section 5 was in itself an illegality which vitiated the sale. The case of *Gobind Lall Roy* v. *Biprodas Roy* (2) is based on the Full Bench case *Lala Mobaruk Lal* v. *the Secretary of State for India in Council* (3). But the Full Bench case is only an authority so far as non-compliance with the provisions of section 6, Act XI of 1859, is concerned. It does not lay down that non-compliance with the provisions of section 5 is an irregularity. It would be difficult to say what is an irregularity and what is an illegality. The effect of the orders striking off the execution proceedings was to remove the attachment, inasmuch as the entire decree was set aside, and there being no subsisting decree, the attachment was at an end—*Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (4). The omission to serve notices under section 7 is not an irregularity for which a sale could be set aside; the object of such notice was merely to prevent the ryots from paying rent to the defaulter, and it could not be possibly urged that there was substantial injury owing to the tenants not receiving the notice, see *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (5).

The judgment of the Court (MACPHERSON and BANERJEE JJ.) was as follows:—

The plaintiff is the proprietor of a five-annas share of the estate referred to in the plaint. On the 21st March 1889, a 13 annas

(1) 12 B. L. R., 297; L. R., 1 I. A., 89.
(2) I. L. R., 17 Calc., 398.
(3) I. L. R., 11 Calc., 200.
(4) 12 B. L. R., 411; 20 W. R., 133.
(5) 13 C. L. R., 1.

8 gundas 3 cowris share of that estate, including the plaintiff's five-anna share, was sold by the Collector for arrears of revenue under the provisions of Act XI of 1859. This suit is brought to set aside that sale on the ground of the various illegalities or irregularities set out in the plaint.

The Subordinate Judge has dismissed the suit, holding that no illegality or irregularity has been proved.

It is now contended that the sale is bad on the ground that the notices prescribed by sections 5 and 7 of Act XI of 1859 were not published, and this is the only ground which we need consider. Section 5 of Act XI of 1859 provides that no estate and no share or interest in any estate shall be sold for the recovery of arrears if such estate is under attachment by order of any judicial authority or managed by the Collector in accordance with such order, unless the special notification provided by that section has been published.

Section 7 provides for a prohibitory notice on the ryots and tenants of the estate in default, forbidding them to pay rent to the defaulting proprietor after the day fixed for the last day of payment. It is conceded that no notice under section 5 was published, and that the estate had been attached; but it is contended that the attachment was not subsisting at the time when the arrear became due and when the estate was sold; and that it is necessary, as it undoubtedly is, in order to bring that section into operation, that the attachment should be a subsisting one.

The facts in connection with the attachment, which was effected in November 1886, are these :—On the 14th December 1881, Ram Ganga Saha obtained a decree for a sum of money due on a mortgage bond against some of the defaulting proprietors. That decree was *ex parte* as regards some only of the defendants in the suit, and it declared that the money was a charge on the mortgaged property. In August 1886, the decree-holder took out execution of the decree, and in October of the same year, while the execution proceedings were pending, Mahomed Mazahar, one of the judgment-debtors, objected to the execution on the ground that the decree against him was *ex-parte*, and that he was not bound by it. The Judge on his appeal set aside the *ex-parte* decree as against him at least, and directed a new trial. The case was re-heard, but it is not clear whether the re-hearing was intended to

1893

MAHOMED AZHAR v. RAJ CHUNDER ROY.

affect Mahomed Mazahar only, or all the defendants in the suit. But, however that may be, on the 17th December 1887, the Munsif made a fresh decree as against all the defendants; and this decree practically superseded the decree which had been originally made. It was a decree for a different sum of money, and it directed that the mortgaged property should be sold in satisfaction of the decree if the amount was not paid within two months from the date on which the decree was signed. In January 1887, the Munsif before whom the execution proceedings were pending, made this order: "The Appellate Court has reversed the Lower Court's decree and has ordered the trial of the case. The execution proceedings may therefore be stopped. Case struck off."

We think that the Subordinate Judge was quite right in holding that the attachment ceased to have effect. Whether the Court was right or wrong in making a fresh decree as against all the defendants, the fact remains that it did do so, and no further proceedings were taken by the decree-holder in connection with the execution case which was struck off in January 1887. In the case of *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (1) the Judicial Committee of Her Majesty's Privy Council considered the effect upon an attachment of the striking off of the execution case in which that attachment had been made, and came to the conclusion that no hard-and-fast rule could be laid down, and that each case must be dealt with by itself. Here we have no doubt that it was the intention of the Court that the execution proceedings should cease altogether pending the retrial of the case, and that also from the circumstances must have been the impression of the decree-holder. Taking into consideration, then, the circumstance that the case was struck off on the ground that the execution could not proceed, that a new decree which practically superseded the old decree was made, and that *that* decree contained a direction for the sale of the property, a direction which rendered any further proceedings under the attachment unnecessary, we think it is clear that the Subordinate Judge has come to a right conclusion in holding that there was no subsisting attachment on this property. In this view it is unnecessary for us to consider whether the omission to comply with provisions of section 5 of Act XI of 1859 was an

(1) 12 B. L. R. 411; 20 W. R. 133.

illegality or irregularity. In the case of *Gobind Lal Roy* v. *Biprodas Roy* (1) decided by a Division Bench of this Court, it was held to be an illegality. In the earlier case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (2), which eventually went before the Judicial Committee of Her Majesty's Privy Council, the omission to serve a notice under section 5 was treated as an irregularity only. The question whether it was an irregularity or illegality does not appear to have been raised before the Judicial Committee, whose decision turned upon the construction to be put upon the following words of section 5: "arrears of estates under attachment by order of any judicial authority or managed by the Collector in accordance with such order."

As regards the notice under section 7, there is a conflict of evidence as to whether this notice was or was not issued. We think that the question is immaterial, because the plaintiff has failed to prove what he was bound to prove under section 33 of the Act, namely, that in consequence of the irregularity he has sustained substantial injury. Some evidence has been given and is unrebutted, that the property was sold for less than its real value; and there is no evidence to connect the inadequacy of price with the irregularity complained of under section 7, and, as observed in the case of *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (3), no injury could have resulted to the judgment-debtor from the omission to serve the notice prescribed by that section; the only object and effect of such a notice being to prevent the tenants from paying rent to the defaulting proprietors. We think, therefore, that the appeal fails on the only grounds advanced before us.

We would say a word in connection with the inadequacy of price complained of by the appellant. We are not at all satisfied that this inadequacy was in any way attributable to any irregularity in publishing or conducting the sale. It appears that in February 1887, Omda Bewa Bibi obtained a decree against the present appellant and some of the co-sharers for possession of an eight-anna share in this estate after foreclosure of a mortgage. It is

(1) I. L. R., 17 Calc., 398.
(2) 12 B. L R. 297; L. R. 1 I. A., 89.
(3) 13 C. L. R., 1.

1893

MAHOMED AZHAR v. RAJ CHUNDER ROY.

quite possible that this decree was a collusive one obtained in order to put the property beyond the reach of creditors; but whether it was collusive or otherwise, the effect on intending purchasers might very well be to prevent them from bidding anything approaching the real value of the property. The estate was sold subject to all existing encumbrances, and even if the purchaser considered that he was in a position to get that decree set aside, he purchased the property knowing almost to a certainty that he purchased it subject to a law suit.

There is one other point, and that is as to the costs which the Lower Court allowed to the defendants. Five sets of costs were allowed. One of them was in favour of the Secretary of State, and with that we think there is no ground for our interference. The remaining four sets have been allowed to different defendants who had put in an appearance by different pleaders, but their defence was substantially the same. We think that there was no occasion for the Court to allow these defendants separate costs amounting in all to a very considerable sum. The amount awarded in the Lower Court as the costs of the Secretary of State will stand, but the decree, in so far as it allows the sum of Rs. 300 to costs of the remaining four sets of defendants as pleaders' fees, will be set aside, and in substitution of that sum we allow a total sum of Rs. 600 for pleaders' fees, which will be divided equally between them.

As regards the costs in this Court, the respondents who have appeared will get one set of costs.

C. S. *Appeal dismissed.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *July* 13.

AZIMUDDIN PATWARI (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).*

Sale for arrears of revenue—Sunset Law—Bengal Act VII of 1868, *s.* 11—*Revenue Sale Law (Act XI of* 1859), *s.* 6.

Section 11 of Bengal Act VII of 1868 makes the Sunset Law as enacted in s. 6 of Act XI of 1859 applicable to sales of tenures under the former

* Appeal from Original Decree, No. 158 of 1892, against the decree of W. H. M. Gun, Esq., District Judge of Noakhali, dated the 30th of March 1892.

Act. The refusal therefore of the Collector to accept payment of the amount due when tendered after sunset on the latest day for payment does not make the sale under Bengal Act VII of 1868 illegal.

THE plaintiff was the owner of a 10-annas share, and the defendants Nos. 6 to 16 were the owners of the remaining 6-annas share in a certain *howla* situated in the Collectorate of Noakhali. For the realization of the sum of Rs. 26-7-6 as rent of the said *howla* due to Government for the instalment of the 28th September 1890, the said *howla* was put up to auction sale in the Noakhali Collectorate on the 10th of January 1891, according to the provisions of Act XI of 1859. Before the sale, the plaintiff tendered the amount of revenue or rent in arrear, but the Collector refused to take it. The defendant No. 2 purchased the said *howla* at the auction sale for Rs. 1,100, and after his purchase he sold a portion of it to the defendants Nos. 3, 4, and 5. The plaintiff then applied to the Commissioner of the district to set aside the sale, but the application was rejected on the 21st April 1891. The sale was confirmed on the 9th of May 1891, and the defendant No. 2 obtained possession of the *howla* land through the Revenue Court on the 4th of July 1891.

The plaintiff then instituted this suit in the District Judge's Court of Noakhali against the Secretary of State, and the defendants Nos. 2, 3, 4, and 5, and added his co-sharers as defendants, to have the sale set aside, on the ground that all the incidental proceedings of the sale were illegal and irregular; that no notice or notification was served; and that in consequence the property fetched an inadequate price.

The District Judge found that there was no irregularity in publishing or conducting the sale, and that the plaintiff had no right to have the sale set aside.

From this decision the plaintiff appealed to the High Court.

Babu *Dwarka Nath Chuckerbutty*, Babu *Debendra Nath Mukerjee*, and Babu *Madhabanund Bysack* for the appellant.

Babu *Hem Chunder Banerjee*, Babu *Ram Charan Mitter*, and Moulvi *Serajul Islam* for the respondents.

Babu *Dwarka Nath Chuckerbutty*:—The sale was for the arrears, not of an estate, but of a small *howla* held by the plaintiff under

1893

AZIMUDDIN PATWARI v. THE SECRETARY OF STATE FOR INDIA.

the Government as zamindar of a *khas mehal*; therefore the provisions of Act XI of 1859 did not apply. The demand of the Government for the arrears for which the sale took place comes within the purview of s. 7, cl. (1) and (6) of the Public Demands Recovery Act, Bengal Act VII of 1880; therefore the sale ought to have taken place under that Act. Even conceding that section 11 of Bengal Act VII of 1868 covers the case, the provisions of Bengal Act VII of 1880, which provides procedure more beneficial to the debtor, ought to have been adopted. If the provisions of Bengal Act VII of 1880 were applicable, the Collector had no right to refuse to accept the arrears tendered before the sale, and, therefore, the sale was without jurisdiction. Then even assuming that s. 11 of Bengal Act VII of 1868 governed the procedure, it does not make s. 6 of Act XI of 1859 applicable in its entirety, because s. 11 of Bengal Act VII of 1868 says "the Collector to whom such revenue is payable may cause the tenure to be sold in the manner and subject to the provisions in and by the said Act XI of 1859." This only shows that the *procedure* of the sale was to be governed by the provisions of Act XI of 1859, and the provisions as to the power of the Collector to refuse to accept the arrears after sunset on the last day as contained in s. 6 of Act XI of 1859 do not apply to a sale under s. 11 of Bengal Act VII of 1868. It is clear on the evidence that the notification provided by law has not been published at all. Such a case is not covered by the provisions of s. 8 of Bengal Act VII of 1868, which only cures the defect in the manner of the publication; it was not intended to cover a case of no publication—*Bal Mokoond Lal* v. *Jirjudhun Roy* (1), *Lala Mobaruk Lal* v. *Secretary of State for India in Council* (2), and *Sadhusaran Singh* v. *Panchdeo Lal* (3).

The inadequacy in the price fetched was due to the non-publication of the necessary notification.

Babu *Hem Chunder Banerjee*:—The case is covered by the express language of s. 11 of Bengal Act VII of 1868: s. 2 of Act VII of 1880 leaves it entirely to the discretion of the Collector to apply the provisions of Bengal Act VII of 1880 or not. The sale

(1) I. L. R., 9 Calc., 271. (2) I. L. R., 11 Calc., 200.
(3) I. L. R., 14 Calc., 1.

took place under the provisions of s. 11 of Bengal Act VII of 1868, and the irregularities complained of, if any, are cured by the provisions of s. 8 of Bengal Act VII of 1868. There was no inadequacy of price, as the learned Judge finds that the properties are liable to the action of the adjacent river.

Babu *Dwarka Nath Chuckerbutty* replied.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

The plaintiff, who is the appellant in this Court, was part owner of a tenure appertaining to a Government *khas mehal.* The tenure was sold by the Collector for arrears of revenue, and was purchased by the second and third defendants in this suit, who subsequently disposed of a portion of their interest to the other defendants. The object of this suit is to set aside the sale and to recover possession of the property sold, on the ground that the sale was illegal and that it was also irregular, and that in consequence of the irregularities it had been sold for a great deal less than its real value. The Lower Court dismissed the suit, holding that the alleged irregularities were not proved and that the sale was not illegal.

It appears that before the sale the plaintiff offered to deposit the amount of the revenue or rent in arrear, but that the Collector refused to take it. It is argued that the sale was illegal because the Collector had no authority to refuse to receive the money; and that the money having been tendered the property ought not to have been sold.

The validity of this contention depends upon the question whether the Sunset Law applies to the sale of tenures. It is contended in the first place before us that this sale did not take place under the provisions of Act XI of 1859 and Bengal Act VII of 1868, but under the Public Demands Recovery Act. For that contention we think there is no ground. It is clear that the sale was not, as a matter of fact, held under Bengal Act VII of 1880, and also that it was not regarded by the plaintiff as a sale under that Act. The irregularities and illegalities charged in the plaint are those which would arise in connection with a sale held under the Revenue Sale Law.

1893

AZIMUDDIN PATWARI v. THE SECRETARY OF STATE FOR INDIA.

Then as to the question whether the Sunset Law applies to the sale of tenures, s. 11 of Bengal Act VII of 1868, which is the section applicable, enacts that "whenever any revenue payable to Government in respect of any tenure not being an estate shall be in arrear after the latest day of payment fixed in the manner prescribed in section 3 of the said Act XI of 1859, the Collector to whom such revenue is payable may cause to be affixed such notices as are mentioned in section 5 of the the said Act XI of 1859, and may thereupon cause such tenure to be sold in the manner, and subject to the provisions in and by the said Act XI of 1859 provided for the sale of estates for the recovery of arrears of revenue." The subsequent provisions of that section are modifications of the provisions of Act XI of 1859 in connection with sales held under the section. Section 6 of Act XI of 1859 prescribes the procedure to be followed in notifying a sale, and directs that "except as hereinafter provided, all estates or shares of estates so specified shall, on the day notified for sale or on the day or days following, be put up to public auction by and in the presence of the Collector or other officer as aforesaid, and shall be sold to the highest bidder. And no payment or tender of payment made after sunset of the said latest day of payment shall bar or interfere with the sale, either at the time of sale or after its conclusion." We feel compelled to hold, although somewhat unwillingly, that the contention of the appellant fails; and that the Sunset Law does, and was intended to, apply to the sale of tenures. There seems to be no way of getting out of the direct terms of the section, or of holding that, although the sale is to be held in the manner and subject to the provisions contained in (among other sections) section 6, Act XI of 1859, the provision relating to payment or tender of payment after sunset of the latest day of payment should not apply. In the Lower Court the appellant adduced a good deal of evidence to show that the notice, which, according to the provisions of section 7 of Act XI of 1859, ought to have been served in the Mofussil, was not served. The evidence has been read to us, and we should not feel disposed to hold contrary to the decision of the Lower Court, that it was proved that the notice had not been served. But, however that may be, we think that the appellant is precluded by section 8 of Bengal Act VII

of 1868 from proving that this particular notice was not served; that section makes the certificate of title given under the provisions of the Sale Law conclusive evidence in favour of the purchaser that "all notices in or by this Act or by the said Act XI of 1859 required to be served or posted have been duly served and posted." The cases cited—*Sadhusaran Singh* v. *Panchdeo Lal* (1), *Bal Mokoond Lal* v. *Jirjudhun Roy* (2), *Lala Mobaruk Lal* v. *Secretary of State for India in Council* (3)—do not help the appellant in his contention that that section does not apply to notices under section 7.

Another difficulty in the appellant's way is, that, even assuming that the notice under section 7 was not served, and that the price realized was not the fair price of the property, there is nothing to connect the inadequacy with the irregularity. *Primâ facie*, an omission to serve a notice, forbidding ryots and under-tenants to pay rent to the defaulting proprietor after the last day of payment would not in any way affect the price which intending bidders would offer for the property.

It was lastly contended that the Collector ought to have proceeded under the provisions of Bengal Act VII of 1880, and not under the provisions of Bengal Act VII of 1868, as when the choice of two procedures is given, that which is most favourable to the debtor ought to be adopted. It is only necessary in answer to point to the provisions of section 2 of Bengal Act VII of 1880, which says that "the powers given by this Act shall be deemed to be in addition to, and not in derogation of, powers conferred by any Act now being in force for the recovery of any due, debt, or demand to which the provisions of this Act are applicable."

The appeal fails on all the grounds which have been taken before us, and must be dismissed with costs.

This judgment will also govern appeal No. 162 of 1892.

Appeal dismissed.

C. S.

(1) I. L. R., 14 Calc., 1. (2) I. L. R., 9 Calc., 271.
(3) I. L. R., 11 Calc., 200.

PRIVY COUNCIL.

P. C.*
1893
Nov. 8.

GANGA PERSHAD SAHU (PLAINTIFF) v. THE LAND MORTGAGE BANK (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Mortgage—Sale of mortgaged property—Relative rights of first and second mortgagees of the same property—Mortgage decree giving terms of redemption of the first by the second—Compound interest.

There being a first and a second mortgage of the same property, a mortgage decree (that upon the first by consent) was obtained by each mortgagee respectively, neither of them being a party to the decree obtained by the other. In the first mortgage it was agreed that, on default by the mortgagor, interest at 12 per cent. should be paid on the principal and interest taken together, the latter being calculated with annual rests. At a judicial sale under the decree obtained by the first mortgagee, he became the purchaser of the greater part of the property.

In this suit, which was brought by the first mortgagee's heir now representing him against the second mortgagee, making the mortgagors parties, for a declaration of his rights, it was decided that the second mortgagee was entitled to redeem the first mortgage. But the Appellate Court, referring to the consent decree having given simple interest only, made this the basis of an inference that compound interest must now be disallowed:—*Held*, that this was not the right inference; and compound interest was allowed, according to the terms of the mortgage.

APPEAL from a decree (15th September 1890) of the High Court, modifying a decree (29th September 1888) of the Subordinate Judge of Bhagulpore.

This suit was brought by the appellant, only son and heir of Bunwari Lal Sahu, deceased, for a declaration of his rights under a mortgage executed on the 17th August 1873 (registered on the 28th), to secure repayment of Rs. 32,000, within one year, with interest at 12 per cent. per annum, upon *taluks* and *mouzas* in the Bhagulpore district. The sole respondent on this appeal was the first defendant in the suit, the Land Mortgage Bank, a Limited Company, to whom a second mortgage (an instrument in the English form), covering the same property, was executed on the

* *Present:* LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.

19th June 1874, securing repayment by certain instalments of Rs. 1,50,000. The mortgagors in both instances were the same, two brothers, Rudermun Singh, now the second defendant, and Bishenmunh Singh, since deceased, and now represented by his sons, also parties to the suit, the brothers having been a joint family. The first question raised below was as to whether the plaintiff, whose father in 1884 had, in execution of a decree upon his mortgage of 1873, purchased the property brought to a judicial sale, had obtained by inheritance an absolute estate, free from these respondents' rights, as puisne mortgagees, to redeem the first mortgage: and a second question was raised, whether assuming that right of redemption to exist, upon what terms as to interest redemption should be allowed. Both the Courts below concurred in holding that these respondents had a right to redeem, and differed only as to whether such redemption should be conditional on the payment of compound interest or not, in regard to the decree obtained by the plaintiff's father. The last was the only question argued upon this appeal.

On the 19th March 1877, Bunwari Lal obtained the above decree upon his mortgage of 1873, by consent of the mortgagors, for the principal amount of Rs. 32,000, and for interest as demanded in his plaint, Rs. 15,961; also for interest, for the period of the pendency of the suit from the 17th of January to the 18th of March 1877, on the principal, at the rate of one per cent. a month, for two months and one day, amounting to Rs. 650-10-8. The Bank was not a party to that suit.

On the 7th July 1887, the lands mortgaged to Bunwari were purchased by the decree-holder, with notice and proclamation of the Bank's claim as mortgagees of the same lands under their subsequent mortgage from the same mortgagors, of 19th June 1874. The sale certificate, dated July 1884, expressly mentioned the mortgage to the Bank.

Out of the Rs. 1,50,000 which was obtained under the mortgage of 19th June 1874, Rs. 70,000 were paid by the Bank to redeem a previous mortgage to one Sardhari Lal, executed by the mortgagor's father, that being the only incumbrance disclosed at the time to the Bank. The balance of the mortgage money was paid to the mortgagors. Default having occurred in the stipulated

1893

GANGA PERSHAD SAHU v. THE LAND MORTGAGE BANK.

payments, the Bank sued upon its mortgage on the 16th September 1876, and obtained an *ex-parte* decree on the 8th January 1877, for Rs. 1,65,613 against the mortgagors. This decree preceded by a few days the suit brought by Bunwari. Neither of the two mortgagees was a party to the suit instituted by the other on his mortgage.

The Bank having attempted to execute, was met by the objection that a partition in the mortgagors' family had taken place. At length, on an arrangement, it was agreed that the family property should be held liable, a schedule of *mouzas* being appended to the decree.

On the 24th April 1882, the Bank obtained a decree declaring that the interests of the members of the mortgagors' joint family were bound by the mortgage and the decree thereon.

On the 7th July 1884, the properties included in the first mortgage were put up to sale in execution of the decree of 19th March 1877, and the greater part of them were purchased by the decree-holder. There were declarations in the certificates of sale as to the mortgage to the Bank, and what it had covered.

The Bank having proceeded to execute their decree against the properties included in the mortgage to them, the plaintiff objected; but his objection was disallowed on the 18th July 1885. The 5th April 1886 was fixed for the sale in execution of the Bank's decree.

Thereupon the plaintiff instituted the present suit, on the same day, to have the sale stayed by injunction, and the rights of the parties declared. The injunction asked for was refused by the Court, which subsequently heard the suit upon the further questions, and there was no appeal upon the former matter. It was also decided in the suit that the defendant Bank had a right to redeem the first mortgage; and reference was made to the fact that the decree on which the plaintiff proceeded was based on the consent of the mortgagors, the foundation of all being the mortgage deed which contained the term that interest should be paid with annual rests. The decree gave compound interest. The defendant Bank appealed, and the plaintiff took objections under section 561 of the Code of Civil Procedure.

A division Bench (PRINSEP and RAMPINI, JJ.) held that the Bank being the second mortgagee would have a right to redeem on paying off the first mortgage. They found no reason for believing that either of the mortgagees was aware, when the suit of each was brought to enforce payment, of the mortgage held by the other. They were unable to hold that it was in the Bank's contemplation, when paying off the existing mortgages, so far as they were then known or disclosed, to do anything but extinguish them. At this conclusion they arrived with regret. And as to the right to take advantage of any incumbrance prior to the plaintiff's, they referred to the decision in *Gokal Das Gopaldas* v. *Ram Buksh Sheochand* (1), showing that the intention was presumed to be to extinguish a paid-off prior incumbrance, and that the Bank, in such a case, must depend on its own mortgage alone.

The judgment continued thus:—

"The result of the findings in this suit is to put the Bank in the position of a second mortgagee. It has, therefore, only the right to redeem the plaintiff's mortgage, and then only to extinguish the title which the plaintiff has now acquired as against the mortgagors by purchase under his own decree. But the Bank has itself bought some of the properties covered by that decree, and therefore it is entitled, in any account between it and the plaintiff, to receive credit for the amount so paid. It is hardly necessary to remark that the amount payable would not be the amount of the purchase-money paid by the plaintiff, but of the amount due under his mortgage with this deduction.

"The parties are not agreed as to the terms on which this account should be prepared in regard to interest. The mortgage deed provided for compound interest. The plaintiff contends that the decree which he obtained against the Bank on account of the mortgagors also allowed compound interest. This is disputed by the Bank, which maintains that under the terms of that decree, the debt was consolidated, and thenceforth bears only simple interest. The plaintiff further contends that as the Bank has refused to be bound by that decree, the account should be prepared quite irrespectively of that decree. It will be more convenient to consider first the point last mentioned. It cannot be denied that the plaintiff should have made the Bank a party to his former suit. That he did not do so was, as far as we can learn from the evidence, due to his ignorance of the Bank's mortgage. But, nevertheless, the plaintiff should not be allowed to have any advantage arising from that omission. The position of the parties, too,

(1) I. L. R., 10 Calc., 1035; L. R., 11 I. A., 26.

1893

GANGA PERSHAD SAHU v. THE LAND MORTGAGE BANK.

after the plaintiff's decree seems to have been this: plaintiff had a decree against the mortgagors, declaring a certain sum to be due under his mortgage lien for certain properties. The mortgage had then disappeared and been incorporated into a decree of the Court declaring the amount due and the conditions in respect to payment and realization. The Bank, which was the second mortgagee, not being a party to that decree, was entitled to require that all the issues necessary for that decree, if it had not been passed by consent, should be found on evidence given in its presence; but by insisting on this, it should not be made liable for any sum greater than that for which the mortgagors were held liable under that decree. As second mortgagee it might, if so advised, have paid off that decree and so redeemed the properties hypothecated, and therefore, in our opinion, that decree should in this suit be accepted as the basis of the account between the parties. The Bank is, in other words, entitled to redeem on the same terms as the mortgagor would have been entitled to redeem, that is, on the account prepared by the decree, provided that if it requires it, the account may be made up in its presence in a suit to which it is a party.

"It next becomes necessary to determine the terms of that decree in respect to interest, and whether it gives simple or compound interest."

The judgment then set forth the decree of the 19th March 1877, and, adding a statement of what had been contended on behalf of the Bank on this point, found that the above decree gave simple interest only, and concluded thus:—

"An account should therefore be prepared on this basis, giving the plaintiff simple interest at 12 per cent. on the amount of the decree from the date of its being passed; and as we understand that decree, it gives such interest only from the date of the institution of the suit. Allowance should, therefore, be made for the amount paid by the Bank for properties purchased at the sale under that decree, and any payments of Government revenue such as are indicated in the judgment of the Court below, made by the Bank, should also be set off.

"The collections made by the plaintiff from any of the properties in his possession should also be deducted. When this account has been settled, a decree should be passed in terms of the Transfer of Property Act. We would point out that although the second mortgagee is entitled to redeem the first mortgage, the first mortgagee, as purchaser of the equity of redemption held by the mortgagors, is in turn entitled, if he so desire it, to redeem the second mortgage. The plaintiff is entitled to his costs from the Bank in this suit and appeal."

On this appeal

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellant, argued that the Subordinate Judge was right in allowing interest

with rests according to the terms agreed upon in the mortgage of 1873. There was no longer any question of the Bank's right to redeem, and only the terms of redemption were in dispute. On this point, no such alteration as that which the High Court understood to have been the result of the consent decree of the 19th March 1877, had been effected. That decree, on the contrary, expressly affirmed the conditions of the mortgage, though with reference to the date of the suit, before the arrival of the period for calculating a rest, the amount of interest was not more than simple interest. In the course of the argument reference was made to *Umesh Chunder Sircar* v. *Zahur Fatima* (1) and *Gobind Lal Roy* v. *Rajanam Misser* (2).

The *Solicitor-General* (Sir *J. Rigby, Q.C.*) and Mr. *R. V. Doyne*, for the respondent Bank, contended that the High Court had followed the correct mode of ascertaining what would have been due from the mortgagors to the first mortgagee, had the former redeemed or paid off the first mortgage. This showed what was the rate of interest payable by the second mortgagee to redeem the first. In connection with the right of the first mortgagee, reference was made to the Transfer of Property Act, IV of 1882, section 72, and to section 209 of the Civil Procedure Code.

Mr. *J. D. Mayne* replied.

Argument having been heard, their Lordships' judgment was delivered by

LORD HOBHOUSE:—The plaintiff in this suit is the first mortgagee, in right of his father, Bunwari Lal Sahu, of certain property, and the defendants, the Land Mortgage Bank of India, are the second mortgagees. On the 19th March 1877, Bunwari Lal Sahu obtained a decree for the realization of his mortgage against the mortgagors of the property, but the defendants were no parties to that suit. Some time afterwards a sale took place in pursuance of the decree, and Bunwari Lal Sahu became the purchaser. Subsequently disputes arose between the defendants and the plaintiff, the defendants disputing the title of the plaintiff. The plaintiff thereupon brought the present suit in the Court of

(1) I. L. R., 18 Calc., 164; L. R., 17 I. A., 201.
(2) I. L. R., 21 Calc., 70; L. R., 20 I. A., 165.

1893

GANGA PERSHAD SAHU v. THE LAND MORTGAGE BANK.

the Subordinate Judge of Bhagulpore to enforce his title as absolute owner. The defendants disputed the plaintiff's title *in toto*, and claimed to be the first incumbrancers upon the property, and in the alternative they claimed to be second mortgagees and to be entitled to redeem the mortgage. All the issues raised by the defendants claiming to be absolute owners were decided against them, but the alternative case that they made was decided in their favour, and it was held that the plaintiff could only stand as mortgagee of the property, and that the defendants were entitled to redeem. The question then arose as to the terms of the redemption, and the principal point raised on that part of the case, which has been the only point argued before their Lordships, was whether or no the plaintiff's mortgage debt should bear compound interest.

By the mortgage bond the mortgagors contracted to pay interest at 12 per cent., and that if they did not pay it they would, "after the expiration of 24th Assin, pay interest on the entire amount of interest not paid (treating it as principal) at one per cent. per mensem, regularly every year all along till the repayment in full of the amount covered by this bond without any objection whatever." It is alleged by the defendants that the terms of the bond were altered by the decree of the 19th March 1877, and that thenceforth simple interest only was to be paid. The Subordinate Judge decided that there was no reason why compound interest should not be allowed according to the terms of the bond. He says there is a stipulation for it in the bond, and he is unable to see why effect should not be given to that stipulation. It does not appear from the judgment of the Subordinate Judge what was the objection then made by the Bank to the payment of compound interest.

On the appeal to the High Court this point was raised amongst others, and on it the judgment of the High Court was in favour of the Bank. The reason given by the Judges of the High Court for so deciding is this. They say that the terms of the decree of the 19th March 1877 do not give compound interest; that the decree was one made by consent, and upon the petition of the mortgagors, admitting the claim of the plaintiff. The petition runs thus:—"It is prayed that the claim may be decreed with

costs and interest for the period of pendency of suit, as well as interest from the date of decree to the day of realization on the entire amount of decree, principal and interest at 1 per cent. per mensem, as per conditions set forth in the bond, the basis of the claim and costs, against the property mortgaged in the bond." The order made thereon was in the following terms:—"That the case be decreed in accordance with the petition of admission of claim."

The High Court then set forth the contentions of the parties as follows: - "It is contended on the one hand that the terms 'as per conditions in the bond' referred only to the rate of interest, '1 per cent. per mensem,' and not to the rests which were specified in the bond, so as to make the interest compound interest; while for the plaintiff it is claimed, that the agreement embodied in the decree was to continue the conditions of the bond in every respect." The High Court then go on to say:—"We have, however, some indication of the manner in which the Court itself regarded this, for in the account of interest during the pendency of the suit, the calculation has been made, not on the consolidated amount of principal and interest forming the entire claim, but on the principal only; and this, we may observe, has been accepted by the parties concerned. We find, therefore, that the decree of 19th March 1877, gave simple interest thenceforth only at 12 per cent. on the amount claimed in the plaint of that suit"; and they varied the decree of the Subordinate Judge in that respect.

It seems to their Lordships that the High Court had no sufficient warrant for putting that construction upon the decree of the 19th March 1877. The terms in the body of the decree are such as to introduce all the conditions of the mortgage. The claim is to be decreed with costs and interest for the period of the pendency of the suit, as well as interest from the date of the decree to the day of realization on the entire amount of the decree, principal and interest, at 1 per cent. per mensem, "as per conditions set forth in the bond." Now, the condition of treating interest as principal, so as to carry interest if it were not paid by a date mentioned in the bond, is just as much one of the conditions of the bond as any other conditions therein, and therefore

1893

GANGA PERSHAD SAHU v. THE LAND MORTGAGE BANK.

their Lordships can see nothing in that language which indicates an intention of altering the contract made by the bond.

But the point relied upon by the Bank is this: The plaintiff in the suit of 1877 sued for Rs. 32,000, the principal secured by the bond, and for a sum of Rs. 15,961-15-3 interest accrued up to the day this plaint was filed, which, it is found by calculation, is compound interest. There is also another item set forth in the decree, namely, interest during the period of the pendency of the case from the 17th January 1877, which was the date of the filing of the plaint, until the 18th March 1877, which was the day before the date of the decree, and that interest was to be "on the principal amount at 1 per cent. per mensem for two months, one day," that is to say, on the Rs. 32,000. That amount is stated in the decree to be Rs. 650-10-8. From that circumstance it is argued that either the parties were making, or the Court was making, a material alteration in the contract effected by the bond. But there is this answer to the contention: The bond is not perfectly without doubt as to its construction. Certainly one construction may be that interest did not carry interest in any year until the 24th Assin had come round, and in that case interest for these two months would not accrue on interest if payment of the simple interest were made by the 24th Assin. That is one construction which may be put upon the bond. Of course another construction is that interest accrued from day to day or from month to month upon interest as well as principal, and that the whole accumulated sum was payable on the 24th Assin; but it is at least conceivable that the parties took the first construction, and in that case it seems that this small item of Rs. 650-10-8 would be as much as could be claimed as due at the date of the decree.

On the other view of the case there would be something more due than Rs. 650-10-8, but it would be something so small as to lead to the conclusion, either that the parties may not have taken it into consideration at all, or that taking it into consideration it was the price of the defendants' consent to a decree that some small sum less than what was actually due should be charged against them. Either of those explanations is a perfectly reasonable explanation, and it seems to their Lordships

to be putting a very great strain upon the introduction of this item of Rupees 650-10-8 into the account stated at the foot of the decree, to make it the basis of an inference that the Court and the parties intended to alter this exceedingly important term of the bond.

The result is that their Lordships will humbly advise Her Majesty that the High Court were wrong on this point, and that the decree made by the High Court should be varied by striking out of it the following words:—"On the basis of his decree of 19th March 1877, with simple interest at the rate of 12 per cent. per annum from that date on the entire amount of the decree" and by substituting these words:—"Under the mortgage bond of the 7th August 1873, interest being calculated according to the terms of that instrument." The rest of the decree will be affirmed.

Their Lordships will humbly advise Her Majesty accordingly. The respondents must pay the costs of the appeal.

Solicitors for the appellant: Messrs. *T. F. Wilson and Co.*

Solicitors for the respondent: Messrs. *Freshfields and Williams.*

Appeal allowed; decree varied.

C. B.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

BRINDABUN CHUNDER NUNDI (DEFENDANT) *v.* RAM SUNDER MOZUMDAR (PLAINTIFF).*

1893 *August* 21.

Sale for arrears of revenue—Act XI of 1859, *s.* 36—*Suit to oust certified purchaser.*

A purchased a mehal in the name of *B's* brother and obtained possession. He then sued *B*, who was acting as his *tehsildar*, for an account and for delivery of certain papers connected with that mehal. *Held*, that the terms of section 36 of Act XI of 1859 did not apply to bar the suit.

* Appeal from Appellate Decree, No. 1951 of 1891, against the decree of F. A. Slack, Esq., Officiating District Judge of Chittagong, dated the 17th of August 1891, modifying the decree of Babu Madhub Chunder Chuckerbutty, Subordinate Judge of that district, dated the 31st of December 1890.

1893

BRINDABUN CHUNDER NUNDI v. RAM SUNDER MOZUMDAR.

A certain mehal No. 23 was put up to sale for arrears of rent, and was purchased by the plaintiff in the *benami* of his servant Ishan Chunder, the brother of the defendant, Ishan Chunder and the defendant forming a joint Hindu family. The defendant was the *tehsildar* of the plaintiff and made the collections of rent for the plaintiff from this mehal as well as from others. As the defendant refused to render his accounts or deliver up the numerous papers in his possession when called upon to do so, the plaintiff instituted the present suit against him for an account in respect of all the mehals for the years 1241 to 1250. Various defences were raised by the defendant in respect of the various mehals, but for the purposes of this report the only contentions it is necessary to refer to were that the mehal No. 23 was purchased by the defendant's brother Ishan Chunder, and that therefore the plaintiff could not claim an account for it; and that s. 36 of Act XI of 1859 was a bar to such a suit.

The Subordinate Judge held that in respect of mehal No. 23 Ishan Chunder was a mere *benamidar*, that the plaintiff was the beneficial owner, and that s. 36 of Act XI of 1859 was not applicable, and he gave him a decree for an account in respect of all the mehals.

On appeal the Judge upheld this decision as regards mehal No. 23. After stating that one of the points to be decided in this appeal was, with regard to mehal No. 23, "is the plaintiff barred by s. 36 of Act XI of 1859 from suing," he observed:—"It appears to me that s. 36 of Act XI of 1859 can only apply where the defendant is the certified purchaser which is not the case here, and I therefore hold that the plaintiff is not barred by that section from suing the defendant with regard to this mehal."

From this decision the defendant appealed to the High Court.

Mr. *E. A. Khundkar* and Babu *Boykantnath Dass* for the appellant.

Babu *Okhil Chunder Sen* and Babu *Lal Mohun Dass* for the respondent.

Mr. *E. A. Khundkar:*—The Lower Courts are in error in construing s. 36 of Act XI of 1859 in the manner in which it has been construed by them. The Judge in the Court below says that this

suit not being a suit against the certified purchaser does not fall within the purview of s. 36; but if the result of this suit is that it ousts the certified purchaser, then the matter clearly comes within s. 36, and the suit should be dismissed. The section is very strict in its terms. It does not merely prevent suits against certified purchasers, but even prevents suits which will result in the certified purchaser being ousted, and this case is a suit of that nature.

The respondents were not called upon.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—Two points have been raised in this appeal, *first*, that the Lower Appellate Court ought to have held that the suit was not maintainable by reason of the provisions of section 36 of Act XI of 1859; and, *second*, that the Lower Appellate Court ought not to have used exhibit X as evidence in this case, the same not having been proved.

As to the first point, section 36 of Act XI of 1859 enacts that "any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." But the present suit is not one brought to oust the certified purchaser. Indeed, it is a suit to which the certified purchaser is no party. It has been brought against the defendant-appellant for the delivery of papers and accounts to the plaintiff in respect of the time during which he was the plaintiff's *tehsildar;* and his defence is that his brother, and not the plaintiff, is the certified purchaser; and that the plaintiff is therefore precluded from maintaining this suit against him. We do not think there is any force in his contention. With reference to a provision of the law somewhat similar to section 36 of the Revenue Sale law, that is, section 260 of Act VIII of 1859, the former Code of Civil Procedure, applicable to execution sales, and which was more comprehensive in its terms than section 36 of Act X of 1859, it has been held by the Judicial Committee in two cases, namely, those of *Buhuns Koonwur*

1893

BRINDABUN CHUNDER NUNDI v. RAM SUNDER MOZUMDAR.

v. *Lalla Buhoree Lall* (1) and *Lokhee Narain Roy Chowdhry* v. *Kallypuddo Bandopadhya* (2), that the section should be construed strictly and literally, and should not be applied to a case where a certified purchaser is the plaintiff and the real owner the party in possession. In the present case the real owner, the plaintiff, may not be under any necessity to bring a suit to oust the certified purchaser, for the simple reason that he is in possession.

That being so, there is no reason why he should be held precluded from maintaining a suit like the present against his *tehsildar* for accounts and papers.

As to the second objection, it is sufficient to say that the admissibility of the document in question was not objected to in the Court of first instance. That being so, we do not think it open to the appellant to take the objection on second appeal.

The appeal is dismissed with costs.

Appeal dismissed.

C. S.

Before Mr. Justice Norris and Mr. Justice Banerjee.

1893 *Aug.* 21.

PANDIT SARDAR (PLAINTIFF) *v.* MEAJAN MIRDHA (DEFENDANT).*

Bengal Tenancy Act (Act VIII of 1885), *ss.* 101, 102—*Record of Rights case—Settlement Officer's decision—Subsequent civil suit—Res judicata.*

A decision by a Settlement Officer under Chapter X of the Bengal Tenancy Act as to which of two persons claiming to be tenant ought to be recorded as such does not operate as *res judicata* in a subsequent civil suit between the same parties concerning the title to the land.

THE facts of this case were as follows:—

Pandit Sardar and Meajan Mirdha both claimed the same *jote*. In the measurement and record of rights under the provisions of Chapter X of the Bengal Tenancy Act the name of Pandit Sardar was recorded as the holder of the *jote*. Meajan Mirdha then

* Appeal from Appellate Decree, No. 2021 of 1892, against the decree of Babu Nobin Chunder Gangooly, Subordinate Judge of Rajshahi, dated the 17th of August 1892, reversing the decree of Babu Atool Chunder Ghose, Munsif of Nowgong, dated the 17th of February 1892.

(1) 10 B. L. R., 159; 14 Moo. I. A., 496.

(2) L. R., 2 I. A., 154.

instituted a suit in the Court of the Settlement Officer in order to get his name entered in the record of rights as owner of the said *jote*. The case was heard *ex-parte*, and the Settlement Officer gave Meajan Mirdha a decree. Pandit Sardar then instituted the present suit against Meajan Mirdha for a declaration of his right to, and for confirmation of his possession of, the land in dispute, on the allegation that the land had been wrongly entered in the name of the defendant in the record of rights by the Settlement Officer. The defendant contended that the suit was barred by the doctrine of *res judicata* and by limitation.

The Munsif held that the suit was not barred by limitation or *res judicata*, and that the plaintiff had made out his title and gave him a decree.

On appeal the District Judge reversed the Munsif's finding on the ground that the decision of the Revenue Officer operated as *res judicata*.

From this decision the plaintiff appealed to the High Court.

Babu *Nand Lal Sarkar* for the appellant.

Babu *Kishory Lal Sarkar* for the respondent.

Babu *Nand Lal Sarkar* for the appellant:—The question involved in this case is whether a dispute between two rival claimants of the same *jama* may be disposed of by a Settlement Officer under Chapter X of the Bengal Tenancy Act, so that his decision may bind the parties as *res judicata* in the event of a subsequent regular suit for the same matter. It may be said that the Settlement Officer's decision will have the force of a decree, but that simply means that it may be enforceable as a decree. The case of *Peary Mohun Mukerjee* v. *Ali Sheik* (1) is an authority in support of the contention that deals with an analagous provision in section 158 of the Bengal Tenancy Act. The recent rulings of this Court—*Narendro Nath Roy Chowdhry* v. *Srinath Sandel* (2) and *Bidhu Mukhi Dabi* v. *Bhugwan Chunder Roy Chowdhry* (3)—curtail the powers of the Settlement Officer. The recent Full Bench case of *Secretary of State for India* v. *Nitye Singh* (4) also supports this contention. The case of *Gokul Sahu* v. *Jadu Nandan*

(1) I. L. R., 20 Calc., 219.
(2) I. L. R., 19 Calc., 641.
(3) I. L. R., 19 Calc., 643.
(4) I. L. R., 21 Calc., 38.

1893

PANDIT SARDAR v. MEAJAN MIRDHA.

Roy (1) is clearly distinguishable. That was a dispute between landlord and tenant. On the above authorities the Settlement Officer's decision cannot be a bar to the present suit.

Babu *Kishory Lal Sarkar* for the respondent:—Under the provision of section 106 and of rule 32 framed by Government under the authority given by the Legislature to the Local Government, the finding by the Settlement Officer as to which of two persons was the tenant in occupation of a particular plot of land had the force of a decree as regards questions of possession, though not regarding questions of title. If that be so, the present suit is not maintainable. The question before the Settlement Officer was "whether the plaintiff was a sub-raiyat under the defendant who claimed to be the raiyat, or whether he was himself the raiyat;" that was clearly a question between a landlord and tenant, though the landlord was not the ulterior landlord. If that relationship was in question, then this case is governed by the case of *Gokul Sahu* v. *Jadu Nandan Roy* (1). The case of *Peary Mohun Mukerjee* v. *Ali Sheik* (2) is not applicable to this case; that case was decided with reference to section 158 of the Bengal Tenancy Act, and section 158 proceeds upon the assumption that the landlord is known, whereas under section 102, clause (*d*), the landlord, *i.e.*, the immediate landlord, of each tenant is to be determined. In this case the Settlement Officer determined that the plaintiff was a sub-raiyat and the defendant, who was another raiyat, was his landlord. Therefore the Settlement Officer's decision was final, and this suit was rightly dismissed by the Court below.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, appellant, for a declaration of his *jote* right to, and for confirmation of his possession of, two plots of land on the allegation that the land had been wrongly entered in the name of the defendant in a record of rights prepared by the Revenue Officer under Chapter X of the Bengal Tenancy Act.

The defence was that the suit was barred by the principle of *res judicata* and also by limitation; and that the *jote* right in the land was with the defendant, and not with the plaintiff.

(1) I. L. R., 17 Calc., 721. (2) I. L. R., 20 Calc., 249.

The First Court held that the pleas in bar were not valid, and that the plaintiff had made out his title, and accordingly gave him a decree. On appeal that decree has been reversed and the suit dismissed on the ground that the decision of the Revenue Officer operates as *res judicata* and is a bar to the present suit.

On second appeal it is contended for the plaintiff that the decision of the Lower Appellate Court is wrong; and we are of opinion that the contention ought to prevail. The Subordinate Judge in his decision relies on the case of *Gokul Sahu* v. *Jadu Nandan Roy* (1), but that case is clearly distinguishable from the present. Here the question of right to certain plots of land is raised as between two persons, each of whom claims to hold them as a tenant, and there is no question now, nor was there any before the Settlement Officer, as between the landlord and the tenant; whereas in the case of *Gokul Sahu* v. *Jadu Nandan Roy* (1) the question that was raised was one between the proprietor of the estate and a person who, according to him, held the land in dispute as his tenant, and whose case was that he was entitled to hold it without any payment of rent to the proprietor. That, then, was clearly a dispute between the landlord on the one hand and the tenant on the other. The facts of that case, moreover, were of a somewhat peculiar nature. There, though the person who was alleged to be the tenant on the land claimed the land as his rent-free property, he admitted that he came upon the land with the leave and license of the proprietor and claimed to hold it free of rent merely on the strength of a *sanad* granted to him by the proprietor. The decision in the record of rights proceeding was found to be one as between landlord and tenant, and was held to operate as *res judicata* in a subsequent suit between the same parties. That case, therefore, does not lay down any such broad proposition as is to be found enunciated in the head note. The case was considered by a full Bench of this Court recently in *Secretary of State for India* v. *Nitye Singh* (2), and the decision of the Full Bench is to the effect that a Revenue Officer in preparing a record of rights under sections 101 and 102 of the Bengal Tenancy Act is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area

(1) I. L. R., 17 Calc., 721. (2) I. L. R., 21 Calc., 38.

1893

PANDIT SARDAR v. MEAJAN MIRDHA.

under enquiry. So far, then, as the authority relied upon by the Lower Appellate Court goes, it does not support the view taken by that Court.

The question then remains whether the decision of any point raised before the Revenue Officer should, under section 107 of the Bengal Tenancy Act, operate as *res judicata* in a subsequent suit in which the same question is raised. It is unnecessary in the present case to consider the effect of any such decision in a subsequent suit as between the landlord and the tenant. All we have now to determine is whether the decision by a Revenue Officer under Chapter X operates as *res judicata* in a subsequent suit between two persons, each of whom claims the land as a tenant We think this question ought to be answered in the negative. If it had been intended by the Legislature that the decision of a Revenue Officer should operate as *res judicata* upon matters like this, the result would be to transfer to the Settlement Officer the jurisdiction to try all civil suits between tenant and tenant in regard to their rights in any land included in the area with reference to which the record of rights is made. It might happen that the person whose name the Settlement Officer records as the tenant may not be entitled to the land in respect of which his name is recorded, and another person may set up a conflicting title to the same land, claiming it on grounds which might render it necessary to determine complicated questions of inheritance or of construction of wills, or other questions of a similar nature. We do not think that such a condition of things could have been intended by the Legislature.

It was argued that the words of section 106 which authorise the Revenue Officer to hear and decide disputes as to the correctness of entries made by him are unlimited in their scope; and that the Revenue Officer in this case was therefore authorised to decide whether the plaintiff or the defendant was the person entitled to the land in dispute; and that if he was so authorised by section 106, his decision must have the force of a decree under section 107 of the Act. We cannot accede to this contention. If we were to confine our attention to section 106, possibly the words of that section might be taken to be unlimited in their scope; but we must regard it as one of a group of sections, the object of which is not

1893

PANDIT SARDAR v. MEAJAN MISDHA.

to have questions of disputed right as between tenant and tenant conclusively determined, but only to enable the landlord to have a summary determination of the matters referred to in section 102. That section 106 must receive a limited construction is clear from the cases that have been decided by this Court with reference to what is the proper scope of an inquiry in a record of rights proceeding. We may refer to two of them, namely, *Narendro Nath Roy Chowdhry* v. *Srinath Sandel* (1), *Bidhu Mukhi Dabi* v. *Bhugwan Chunder Roy* (2), and we may also refer to the case of *Peary Mohun Mukerjee* v. *Ali Sheik* (3), relating an analogous provision in the Bengal Tenancy Act, namely, that contained in section 158. In this last-mentioned case it was held that the decision of the Revenue Officer upon any question such as that mentioned in section 158, sub-section (1), clause (*b*), must be taken to be collateral only with reference to any question of right to possession.

For these reasons we are of opinion that the decision appealed against is wrong in law and must be set aside, and the case sent back to the Lower Appellate Court for a decision on the merits.

The appellant will have his costs in this Court. The other costs will follow the result.

Appeal allowed.

C. S.

Before Mr. Justice Norris and Mr. Justice Banerjee.

SATYENDRA NATH THAKUR (PLAINTIFF) *v.* NILKANTHA SINGHA (DEFENDANT).*

1893 *August* 29.

Sale for arrears of rent—Sale on basis of decree on compromise—Auction purchaser, title of—Liability of purchaser for rent accruing due after his purchase, but before confirmation of sale—Effect of compromise as against purchaser—Rent, accrual of.

A tenant, when sued for arrears of rent of a *jote*, compromised the case by executing a *solehnama* agreeing to pay rent at 13 annas per bigha on 4,300

* Appeal from Appellate Decree No. 700 of 1892, against the decree of C. M. W. Brett, Esq., District Judge of Jessore, dated the 17th of February 1892, affirming the decree of Babu Kailash Chander Mookerjee, Subordinate Judge of Khoolnah, dated the 28th of August 1891.

(1) I. L. R., 19 Calc., 641. (2) I. L. R., 19 Calc., 643.
(3) I. L. R., 20 Calc., 249.

1893

SATYENDRA NATH THAKUR v. NILKANTHA SINGHA.

bighas. Subsequently the *jote* was sold in execution of a decree passed on the basis of the *solehnama*, and was purchased by the defendant on the 20th March 1889, the sale being confirmed on the 7th August 1889. In a suit instituted by the landlord against the auction purchaser for arrears of rent for the whole year 1296 (13th April 1889 to 12th April 1890), *held*, that the purchaser was liable for the whole instalment of rent accrued due after the date of his purchase, but before the confirmation of the sale, notwithstanding that his title was not perfected until the latter date. Rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or, in the absence of any contract, according to the general law laid down in s. 53 of the Bengal Tenancy Act.

Held also, that he was liable for rent under the terms of the *solehnama* irrespective of any question as to whether the quantity of land there mentioned was correct or not.

THE plaintiff by a *potta* and *kabuliat*, dated the 12th Aughran 1285 (27th November 1878) settled a *jote* in his *putni taluq* with three persons, and they obtained possession of the *jote*. In 1293 (1886) he brought a suit against the *jotedars* for recovery of arrears of rent. The suit was compromised and a *solehnama* was drawn up, and in that *solehnama* it was stated that in consideration of certain indulgences allowed by the plaintiff in the manner in which rent would be realized, the *jotedars* agreed to pay him rent at 13 annas per bigha for 4,300 bighas included in their lease; the area of the land as described in the *kabuliat* being 3,800 bighas. Subsequently the *jote* was sold in execution of a decree obtained on the basis of the *solehnama*, and was purchased by the present defendant on the 20th of March 1889. The sale was confirmed on the 23rd Srabun 1296 (7th of August 1889). The plaintiff instituted the present suit on the 13th of June 1890 against the auction purchaser, claiming the rent for the tenure for the whole of 1296 (13th April 1889 to 12th April 1890) with cesses and interest at the rate of 13 annas per bigha on 4,300 bighas of land as stated in the *solehnama*. The defendant contended that he was liable to rent only from the date of the confirmation of the sale, and also that he was not in possession of all the land specified in the *solehnama*.

The Subordinate Judge held that the defendant was only liable for the arrears of rent from the date of the confirmation of the sale, and gave the plaintiff a decree for the amount of land as set

out in the *solehnama* less 57 bighas 8½ cottahs at 13 annas per bigha, but only for 13 annas of the yearly rental. On appeal the Subordinate Judge's decision was upheld and the appeal dismissed.

From this decision the plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* and Babu *Nolini Ranjan Chatterjee* for the appellant.

Babu *Mohiny Mohun Roy* and Babu *Hara Proshad Chatterjee* for the respondent.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—In this appeal, which arises out of a suit for arrears of rent, two grounds have been urged on behalf of the plaintiff, appellant,—*first*, that as the title of the defendant who purchased the tenure at a sale in execution of a decree for rent had become perfected by confirmation of the sale before the date when the Assin instalment of rent for the year 1296 fell due, the Courts below ought to have decreed the claim for that instalment in full, instead of giving the plaintiff a decree only for a part thereof which was proportionate to the time intervening between the date of confirmation of the sale and the date when the instalment fell due; and *second*, that the Courts below were wrong in granting the defendant abatement of rent in respect of 57 bighas, when the former tenant had by a *solehnama* agreed to pay rent for whole area of 4,300 bighas, and not to claim remission of rent on any account whatever.

We think the appellant is entitled to succeed on both these grounds. As to the first ground, it is quite true that the title of the defendant, the auction purchaser of the tenure in respect of which rent is claimed, became perfected only on the date of the confirmation of sale under section 316 of the Code of Civil Procedure. But the whole of the instalment in question fell due after that date, and rent should, in our opinion, ordinarily be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy, or the general law, in the absence of such contract, as laid down in section 53 of the Bengal Tenancy Act. It was argued for the respondent

1893

SATYENDRA NATH THAKUR v. NILKANTHA SINGHA.

that if this view is adopted it may go very hard against the purchaser of a tenure, who would be made liable for rent due in respect of the whole of the period of time when he has had possession only for a part of that period, and it may be for a very small part. The answer to this objection is that the purchaser can always protect himself when making his purchase by paying for the property only so much as is equivalent to its value, regard being had to the liability with which it is burdened. In support of this view we may refer to the case of *Chatrapul Singh* v. *Grindra Chunder Roy* (1).

The learned vakil for the respondent referred to section 36 of the Transfer of Property Act as showing that the view taken by the Courts below is correct; but that section has no application to a case like the present, for two reasons; *first*, because by section 2, clause (*d*), of the Transfer of Property Act, section 36 does not apply to execution sales; and, *secondly*, because the apportionment of rent that *that* section contemplates is one following the transfer of the interest of the person entitled to receive the rent, and not the transfer of the interest of the person bound to pay it.

Then, as regards the second ground, the former tenant, by the compromise, dated the 24th February 1887, agreed that rent should be paid in respect of 4,300 bighas, and that no remissions of rent should be claimed on any account whatever. The Lower Appellate Court has held that *that* compromise was a valid and binding transaction, and that being so, the present defendant must be held to be bound by it. In support of this view we may refer to the case of *Ishan Chunder Chowdhry* v. *Chunder Kant Roy* (2).

The result then is that the decrees of the Courts below will be modified by allowing the plaintiff to recover the whole of the Assin instalment of 1296, and to recover rent upon the whole area of 4,300 bighas, with interest and cesses on the amount allowed.

The appellant is entitled to his costs in all the Courts.

Decree varied.

C. S.

(1) I. L. R., 6 Calc., 389.
(2) 13 C. L. R., 55.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

BAIKANTA NATH MITTRA (JUDGMENT-DEBTOR) *v.* AUGHORE NATH BOSE (DECREE-HOLDER).*

1893 *December* 18.

Bengal Tenancy Act (VIII of 1885), Sch. III, cl. 6—Limitation—Decree in suit for rent—Execution of decree—Final decree—Execution proceedings struck off—Bengal Tenancy Act (VIII of 1885), ss. 143, 144, 148.

Having regard to ss. 143, 144 and 148 of the Bengal Tenancy Act, there is a special procedure laid down for rent suits; and therefore decrees in rent suits are decrees under Art. 6 of Sch. III of that Act.

The words "final decree" in Article 6, Sch. III, of the Bengal Tenancy Act, refer to the final decree in the suit, and cannot be held to include an order of an Appellate Court made in an application to set aside that decree under s. 108 of the Code of Civil Procedure.

An *ex-parte* rent decree having been obtained on the 30th May 1888 for a sum under Rs. 500, the decree-holder on the 27th May 1889 applied for execution thereof and attached certain properties of the judgment-debtor, the date fixed for the sale being the 31st August 1889. The judgment-debtor applied under s. 108 of the Civil Procedure Code for a rehearing of the rent suit, and on the day fixed for the sale applied for stay of execution: the sale was stayed, and the Court of its own motion and for its own convenience directed the execution case to be struck off the file "for the present." On the 28th December 1889 the Court passed an order refusing a rehearing of the suit, which order was upheld on appeal on the 16th May 1890. On the 21st January 1892 the decree-holder again applied for execution, at the same time praying that his application might be taken to be in continuation of his former application of the 27th May 1889. *Held*, that the application was one in continuation of the former proceedings in execution so far, at least, as regarded the property mentioned in the former application, but as regards other properties it must be held to be barred as not having been made within three years from the decree of the 30th May 1883.

On the 30th May 1888 one Aughore Nath Bose obtained an *ex-parte* decree for arrears of rent for a sum less than Rs. 500 against one Baikanta Nath Mittra, and applied for execution thereof on the 27th May 1889. Certain property belonging to

* Appeal from Order No. 55 of 1893, against the order of Babu Naffar Chunder Bhutto, Subordinate Judge of Hooghly, dated the 31st of December 1892, affirming the order of Babu Sarat Chunder Ghosal, Munsif of Ulloobariah, dated the 13th of May 1892.

1893

BAIKANTA NATH MITTRA v. AUGHORE NATH BOSE.

the judgment-debtor was in June attached, and a sale proclamation issued in July 1889. Baikanta Nath thereupon applied under s. 108 of the Code of Civil Procedure for a rehearing of the rent suit, on the ground that he had not received notice of the suit, and on the 31st August 1889, the day fixed for the sale, applied that the execution proceedings might be stayed. The sale was accordingly stayed, and the Court of its own motion on the 31st October 1889 passed an order directing the striking off of the execution proceedings "for the present," the property remaining nevertheless under attachment.

On the 28th December 1889, the Court passed an order refusing the application made for a rehearing of the original suit; and on the 16th May 1890 an appeal against such last-mentioned order was dismissed.

Aughore Nath on the 21st January 1892 made an application to execute his rent decree, asking for the attachment of certain properties, and further praying that the attachment in execution case No. 219 of 1889 (the original execution proceedings) might remain in force and action be taken in the present execution as a continuation or revival of the said execution.

The judgment-debtor contended that the application was barred under Sch. III, Article 6 of the Bengal Tenancy Act, three years having elapsed since the date of the rent decree on the 30th May 1888. The decree-holder contended that (1) limitation ran from the date of the disposal of the appeal on the 16th May 1890; (2) that the present application for execution was one in continuation of the prior execution proceedings; and (3) that the judgment-debtor's successful attempt to stay the sale on the very day fixed for it was a fraud on him, and that he was, therefore, entitled to the exception to Article 6, Sch. III, of the Bengal Tenancy Act.

The Munsif preferring the decisions of *Lutful Huq* v. *Sumbhudin Pattuck* (1) and *Narsingh Sewak Singh* v. *Madho Das* (2) to that of *Jivaji* v. *Ram Chandra* (3), allowed the first contention of the decree-holder, and on the authority of *Chandra Prodhan* v. *Gopi Mohan Shaha* (4) and *Paras Ram* v. *Gardner* (5), held that the

(1) I. L. R., 8 Calc., 248.
(2) I. L. R., 4 All., 274.
(3) I. L. R., 16 Bom., 123.
(4) I. L. R., 14 Calc., 385.
(5) I. L. R., 1 All., 355.

application was one in continuation or revival of the previous application for execution; and further held, on the authority of *Annamalai* v. *Rangasami* (1) and *Bhagu Jetha* v *Malek Bawasaheb* (2), that the decree-holder was entitled to the exception claimed by him in the third contention. Execution was therefore allowed.

On appeal, the Subordinate Judge held that the application was not barred, as limitation ran from the final decree of the Appellate Court on the 16th May 1890, and that the present application must be considered as a continuance of the previous application for execution on the authority of *Lutful Huq* v. *Sumbhudin Pattuck* (3) and *Hurry Charan Bose* v. *Subaydar Sheikh* (4), and *Chintaman Damodar Agashe* v. *Balshastri* (5), respectively.

The judgment-debtor appealed to the High Court.

Babu *Nilmadhub Bose* (with him Babu *Jyati Prosad Sarbadikary*) for the appellant contended that the final decree from which limitation ran was the decree of the 30th May 1888; and that the application of the 21st January 1892 must be taken to be an application to execute that decree, and was barred by Article 6, Sch. III, of the Bengal Tenancy Act.

Babu *Trailokya Nath Mittra* (with him Babu *Hari Charan Sarkhel*) for the respondent contended that the application of the 21st January 1892 was one in continuation of the previous application for execution, citing *Chandra Prodhan* v. *Gopi Mohan Shaha* (6).

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

BEVERLEY, J.:—This is an appeal from an order of the Subordinate Judge of Hooghly, disallowing an objection to the execution of a decree on the ground of limitation.

The decree was made *ex-parte* on the 30th May 1888, and was for arrears of rent not exceeding Rs. 500. An application to execute the decree (No. 219 of 1889) was made on 27th May 1889, and certain property was attached; but on the 31st August,

(1) I. L. R., 6 Mad., 365.
(2) I. L. R., 9 Bom., 318.
(3) I. L. R., 8 Calc., 218.
(4) I. L. R., 12 Calc., 161.
(5) I. L. R., 16 Bom., 294.
(6) I. L. R., 14 Calc., 385.

1893

BAIKANTA NATH MITTRA v. AUGHORE NATH BOSE.

the day fixed for sale, the judgment-debtor applied to have the *ex-parte* decree set aside, and pending the disposal of that application, the sale was stayed. On the 31st October 1889, the Court made a further order striking the execution case off the file "for the present," the property remaining under attachment.

The application to set aside the decree was rejected on the 28th December 1889, and this order was confirmed in appeal on the 16th May 1890.

On the 21st January 1892, the decree-holder made an application to execute the decree by attachment and sale of certain properties, and in that application he prayed that "the attachment in execution 219 of 1889 might remain in force, and action be taken in the present execution as a continuation or revival of the said execution."

The judgment-debtor contended that the application of the 21st January 1892 was barred under Schedule III, Art. 6, of the Bengal Tenancy Act, three years having elapsed since the date of the decree. The Subordinate Judge disallowed the objection relying on the case of *Lutful Huq* v. *Sumbhudin Pattuck* (1), and holding that the order of 16th May 1890 dismissing the appeal against the order rejecting the application to set aside the *ex-parte* decree was the final decree within the meaning of the article referred to. And he also held that as regards the properties named in the first application, the present application might fairly be considered to be a continuance of the proceedings taken upon that application.

It is contended before us that the Subordinate Judge was wrong in treating the order of the 16th May 1890 as the final decree in the suit, and in allowing a fresh period of limitation from the date of that order; and it is further argued that the application of the 21st January 1892 must be taken to be an application to execute the decree within the meaning of the article in question, and that it is therefore barred.

We agree with the learned Pleader who appeared for the appellant in this case that the decree in question must be taken to be a decree under the Bengal Tenancy Act within the meaning of Schedule III, Article 6. We think that, having regard to

(1) I. L. R., 8 Calc., 248.

sections 143, 144 and 148 of that Act, there is a special procedure laid down for rent suits, and that therefore decrees in rent suits are decrees under that Act, within the meaning of that article.

We are also of opinion that the "final decree" mentioned in that article must be the final decree in the suit and cannot be held to include an order in appeal upon an application to set aside that decree under section 108 of the Code. It follows, therefore, that execution of the decree now in question would be barred, unless applied for within three years from the date of the decree of 30th May 1888. We have, however, been referred to a case of *Chandra Prodhan* v. *Gopi Mohun Shaha* (1), which appears to be on all fours with the present case, in which it was held that when the execution proceedings are stayed by order of the Court, a subsequent application to remove that order and proceed with the execution may be taken as a continuation of the former proceedings. That decision appears to be in harmony with a long series of decisions both in this Court and in the other High Courts, and we see no reason to dissent from it. In the present case execution of the decree was stayed at the instance of the judgment-debtor; the case was struck off the file merely "for the present" and for the convenience of the Court; the property remained under attachment, and in his application of 21st January 1892 the decree-holder expressly prayed that that application might be taken to be a continuation of the former proceedings. Under these circumstances we think that the application in question must be taken to be not a distinct application to execute the decree, but an application in the former execution proceedings, so far at least as regards the property which was mentioned in the former application to execute the decree, and which was under attachment at the time when that execution case was struck off, that is to say, on the 31st October 1889. As regards any other properties mentioned in the application of the 21st January 1892, we think that, as has been decided in several cases both in this Court and in the other High Courts, the application is barred. The appeal will accordingly be allowed except as regards the property which was under attachment in execution case No. 219 of 1889, and the Court executing the decree will, of course, see that no proceedings are taken against any other

(1) I. L. R., 14 Calc., 385.

1893

BAIKANTA NATH MITTRA v. AUGHORE NATH BOSE.

property except that mentioned in the application of 27th May 1889. We make no order as to costs in this Court.

Appeal allowed in part.

T. A. P.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1893 *Aug.* 28.

MOHER SHEIKH AND OTHERS *v.* QUEEN-EMPRESS.*

Evidence—Statement as complainant while in custody as an accused person—Depositions in counter case—Compelling witness to answer questions—Evidence Act (I of 1872), ss. 129, 130, 131, 132—*Rights of true owners against person in wrongful possession—Affray, evidence as to nature of.*

If a person while in custody as an accused gives information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial.

The depositions of witnesses given in a counter case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them: *Queen* v. *Gopal Doss* (1) and *Queen-Empress* v. *Ganu Sonba* (2) followed.

The mere subpœnaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132, and 148, Evidence Act, compared and discussed.

When a party is in possession for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose.

In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats on which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows.

* Criminal Appeal No. 626 of 1893, against the order passed by J. F. Bradbury, Esq., Sessions Judge of Pubna, dated the 11th of August 1893.

(1) I. L. R., 3 Mad., 271. (2) I. L. R., 12 Bom., 440.

THE facts of this case are sufficiently stated in the judgment.

Mr. *W. Jackson*, Mr. *A. Chaudhuri* and Mr. *K. N. Chaudhuri* for the appellants.

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

Mr. *Jackson*.—The Sessions Judge has improperly admitted the first information in the counter case given by one of the accused, Kailash Haldar, against all the other accused. It is not evidence even against Kailash, as that information was given after Kailash had been arrested on a charge of rioting, and he made the statement while in police custody. It is on no better footing than the statement made by an accused person to a police officer while in custody, and therefore clearly not evidence at all. Objection on both these grounds was taken by Counsel in the Lower Court but overruled. The accused have been prejudiced by the admission of this document in evidence, as the Sessions Judge has drawn inferences from it against the accused.

The Sessions Judge has also improperly admitted in evidence the depositions of Kailash and Bhagaban given by them in the counter case as evidence against all the accused. They can under no circumstances be treated as evidence against the accused other than Kailash and Bhagaban. Even against them they cannot be received as evidence. The Sessions Judge referred to *Queen* v. *Gopal Doss* (1), *Queen-Empress* v. *Samiappa* (2), and *Queen-Empress* v. *Ganu Sonba* (3). The Sessions Judge also relies upon two of his own cases which came up on appeal here, and he says that although the appeals were argued by learned pleaders, no objection seems to have been taken to such depositions being received in evidence. The records of those cases do not show that the point was raised, and the judgments of this Court on appeal make no mention of such a point having at any time been taken. There are no decided cases of this Court one way or the other. The majority of the Madras High Court in *Queen* v. *Gopal Doss* (1) have held that where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be

(1) I. L. R., 3 Mad., 271. (2) I. L. R., 15 Mad., 63.
(3) I. L. R., 12 Bom., 440.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

used against him on his trial on a criminal charge. This has been followed by the Bombay High Court in *Queen-Empress* v. *Ganu Sonba* (1), and again by the Madras Court. The governing words in the judgment of the Madras Court in *Queen* v. *Gopal Doss* (2) are "statement made voluntarily and without compulsion," and the majority of the Court say that if a witness does not desire to have his answers used against him on a subsequent criminal charge he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled. It seems absurd that an accused person should be required to go through the solemn farce of objecting to answer, knowing full well that his objection must be overruled by the Judge, who has under the Evidence Act no power to allow the objection. I adopt the judgment of Mr. Justice Muthusami Ayyar in *Queen* v. *Gopal Doss* as my argument on this point. The Bombay Court has followed the Madras case, but one of the Judges dissented from the judgment of the majority and followed Mr. Justice Muthusami Ayyar. The Bombay case was not argued at the bar. The later Madras case merely followed the ruling of the earlier Madras Full Bench. Even those cases are distinguishable. Those cases arise out of proceedings where persons may or may not have chosen to give their evidence. They were under no compulsion to give their evidence. In this case Kailash and Bhagaban were called by the Crown as witnesses in the counter case of rioting. They could not refuse to give evidence.

If evidence has been improperly admitted and rejected by the Appellate Court as such, the Appellate Court cannot determine the appeal upon the remainder of the evidence. Section 167 of the Evidence Act does not sanction the rulings to the contrary in *The Queen* v. *Hurribole Chunder Ghose* (3) and other cases there referred to.

There seems to be an impression that *Ganouri Lal Dass* v. *Queen-Empress* (4) has repealed the law regarding the right of private defence. That case decides no principles.

The *Officiating Deputy Legal Remembrancer* for the Crown.—The Madras case, *Queen* v. *Gopal Doss*, lays down the law correctly.

(1) I. L. R., 12 Bom., 440.
(2) I. L. R., 3 Mad., 271.
(3) I. L. R., 1 Calc., 207.
(4) I. L. R., 16 Calc., 206.

Section 132 of the Evidence Act is not capable of any other construction than that given to it by the Madras Court. Compulsion in that section applies to pressure put upon the witness after he is in the box and when he asks to be excused from answering a question.

Mr. *A. Chaudhuri* replied.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

In this case the 1st appellant, Moher Sheikh, has been convicted of murder and sentenced to transportation for life; and the other appellants have been convicted of rioting and each sentenced to two years' rigorous imprisonment.

The case has been argued at great length both on the facts and on certain points of law which are said to arise in the case.

The Lower Court has accepted in evidence three documents which were objected to at the trial by Counsel for the accused. This objection has been repeated before us.

The three documents consist of an information given to the police by the accused, Kailash Haldar, and depositions given in a counter case by the appellants, Kailash Haldar and Bhagaban Haldar.

There is no doubt that the information given by Kailash is not evidence, as it was given while he was in the custody of the police. The depositions stand upon a different footing. We heard out the arguments as to their admissibility, but thought it fair that we should not determine the question or look at the depositions until we had made up our minds whether the evidence apart from those depositions justified a conviction. Of course those depositions could at the highest only be evidence against the persons making them. We now proceed to consider the case apart from the information and depositions which have been considered by the Lower Court and by the assessors.

The story as told by the prosecution would, if believed, show that one of those fights or rather battles as to the possession of land which are now so common in this province, had taken place, and that, as so frequently happens, one of the combatants had met with his death. It is beyond question that there is a dispute as to the right of fishing in a *bhil* called the Ghughudoho *bhil*.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

The rival claimants belong respectively to the parties of one Mohesh Kundu and one Haider Jan Chowdhry.

In this *bhil* there are three *khathas*: a *khatha* is a portion of the *bhil* in which leaves and branches of trees are strewn so as to attract the fish. This part is enclosed with nets. The nets are gradually constricted and the branches taken out, so the fish are caught. There can be little doubt but that the affray, or whatever term may be most appropriate to the occurrences which have given rise to the inquiry, took place with regard to the Ghughudoho *khatha*. This *khatha* had been unquestionably fished by Kailash and Bhagaban, two of the appellants before us, and their partners through the whole of 1299, and at least until the Friday before the occurrence, *i.e.*, the 30th Bysakh or the 12th May last. The other two *khathas* were fished by the other party. The occurrence took place on the 16th May.

The question of possession only becomes most material when one has to see whether the acts, if any, of the accused persons are justified by a right of private defence. To some extent perhaps it may be of assistance in determining the question as to what was actually done.

One of the most important questions argued in this case is whether Harmohan Haldar, who met his death in this encounter, died from a spear wound, or whether he died from drowning. The defence suggests now that Harmohan died from drowning, and that the wound was inflicted on his body after death. There can be no doubt that this wound was inflicted before Harmohan's body was brought to land. The learned Judge in the Court below has repudiated the expert testimony of the Civil Surgeon. It may perhaps have been to some extent unfortunate that this gentleman had had so little experience; but looking at his evidence and giving effect to every portion of it, looking also at the evidence of the Hospital Assistant, who is by no means wanting in experience, and at the other evidence in the case, we think it is clear that Harmohan met his death by the spear wound and not by drowning. Looking at the evidence of the Civil Surgeon in the way most favourable to the accused, it merely shows that the appearances were consistent with death either from the spear wound or from drowning. Unquestionably the spear wound was

severe enough to cause death, and no man with such a wound could have survived. It does sometimes happen that wounds of this kind are made after death for the purpose of incriminating innocent persons, but there is no reason to suppose that that is the case here.

We cannot guess when and how the man was drowned. He was one of the complainant's party. If he had been apparently drowned, he would probably have been brought ashore, and not struck in a vital part with a spear. The time within which all this took place was too short for anything of the kind to be done. The complainant's party were too much occupied in capturing their adversaries to concoct a case of this kind. We find it impossible even to guess how, when, or where the man was drowned. The case as to drowning seems to have been made up for the purposes of the defence. It is so vague and baseless that we decline to rely on it, and we hold that Harmohan died from the spear wound.

The real question of fact in this case is what was done by the appellants. We have only one story before us. We must decide whether it is credible, or whether there are any suspicious circumstances attaching to it.

The evidence has been very carefully discussed before us, but we think it is in main true.

We think it clear that the complainant's party were in possession of the *khatha* from the Friday to the Tuesday. The evidence as to this is entirely one-sided, and we cannot find that cross-examination of the witnesses suggests any other case. It is equally clear that the party of the accused went to this *khatha* when the complainant's party were fishing. These two parties had long been at variance, and it cannot be that the complainant's party being in possession, the accused went there for any other purpose than to turn them out. That they were there then is shown by the fact of their arrest. There was no question of a right of private defence in this case. The other side were in possession though it may have been a wrongful possession. The appellants were not entitled to go in force to turn them out. Much less were they entitled to take a spearman with them for the purpose. It was argued very strenuously before us that, except so far as Moher was concerned, there

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

was no evidence to show that the appellants took any part in the riot.

Bhagaban and Kailash, according to the evidence, punted one of the boats. There is general evidence as to the accused taking part in this riot. One does not expect in an affray of this kind to find specific evidence as to the acts of each fighter. The men who punted are just as blameworthy as the men who struck the blows, and it must be remembered that Bhagaban and Kailash were practically the leaders of the party.

The action of the others was on their behalf. There is some evidence that Moshim was captured on the land. Aditya Chunder Bagchi says:—"Moshim I saw on the bank; he was brought from the north, but I forget by whom. I forget if any one else was seized on land."

But, on the other hand, there is abundant evidence that Moshim was captured on the *bhil*, and this is believed by the Judge and the assessors. We do not think that upon the evidence Moshim's case differs from that of the others. The assessors are not satisfied that Moher was responsible for the death of Harmohan. There seems to be a mass of evidence upon the subject, which was really the most important incident in the fight, and we cannot see the smallest reason for disbelieving the story that Moher speared Harmohan. Without looking at the depositions and the information admitted by the Judge, we think that the evidence on the record justified the conviction, and we dismiss the appeal of all the prisoners.

Although in the view which we take of the evidence it is not absolutely necessary for us to determine the question of the admissibility of the depositions, we think it desirable that we should express the opinion which we have formed after having had the matter fully argued on both sides.

The documents were admitted by the Judge of the Court below, and so it would have been difficult for us to have heard this case without having had the question argued. Besides, we do not wish to leave the Judge in uncertainty on this question. It is one which must necessarily arise in many cases before him, and appears to have recently arisen in other cases which he has tried. Pubna, the district from which this appeal comes, is prolific

of riots and affrays, which invariably result in criminal charges and counter-charges, and in such cases this question may often arise. We therefore desire to express the opinion which we have formed, namely, that the Judge was right in admitting these depositions as evidence against the persons making them. Kailash and Bhagaban were called and examined as witnesses in the counter case arising out of this same riot. It does not appear that they objected to answer any of the questions put to them.

The question depends upon the construction of section 132 of the Evidence Act, which is as follows:—

"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

"Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer."

One of the most elementary principles of the construction of statutes is that, if possible, effect should be given to every word. The whole question resolves itself into the meaning which must be given to the words "which a witness shall be compelled to give." The Counsel for the defence argues that those words are either surplusage or apply to every case where the witness is subpœnaed to give evidence or gives evidence otherwise than voluntarily. The Counsel for the prosecution contends that it applies to pressure put upon the witness after he is in the box and when he asks to be excused from answering a question.

The same question was fully considered by a Full Bench of the Madras High Court in a case of the *Queen* v. *Gopal Doss* (1). There three Judges held that it was admissible and two that it was not.

In a Bombay case, which was, however, not argued, two Judges held that it was admissible, and one that it was not; *Queen-Empress* v. *Ganu Sonba* (2).

(1) I. L. R., 3 Mad., 21 (2) I L. R., 12 Bom., 440.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

We think we are bound, if we can, to give some meaning to the words referred to, and not to treat them as surplusage. The mere subpœnaing of a witness or ordering him to go into the witness-box does not, we think, compel him to give any particular answer or to answer any particular question. We are entitled to look at other sections of the Evidence Act to see what "compelling a witness to give an answer" means.

In section 148 it is clear that the same words can only bear the meaning which the Counsel for the prosecution seeks to put upon section 132. In section 129 "compelled" cannot mean "subpœnaed," and it uses the words "compelled to disclose" with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box. The provisions of sections 130 and 131 are also clear on this point. There is nothing to prevent a person being subpœnaed to produce title deeds or other documents which he would be entitled to refuse to produce. It is for him to claim his privilege when asked in Court to produce them.

In no view do we think can we give any effect to the word "compelled" in section 132 without adopting the argument of the prosecution. Even a volunteering witness is under the obligation of law to answer legal questions, and in one sense every answer can be said to be an answer which a witness is compelled to give, but the words cannot have been used in this sense in the section; the idea would have been expressed as well by the word "answer."

The most potent argument against the construction which we are placing upon this section was pressed upon us with great force by learned Counsel for the accused, and is best expressed in the words of Mr. Justice Muthusami Ayyar at p. 284, I. L. R., 3 Madras—"It seems to me incongruous that the Legislature should have directed the Judge *never* to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the Judge to excuse him from answering such a question."

But we do not think that, as has been argued, the Judge has nothing to do in the matter at all, and that it is a mere empty farce for the witness to object to answer, for the Judge has to decide whether the question is relevant to the matter in issue, and

upon that determination partly depends the obligation to answer. We prefer the decisions of the majority in the two High Courts, and hold that the depositions were admissible.

1893

MOHER SHEIKH v. QUEEN-EMPRESS.

Mr. Jackson for the accused wishes us to note that he argued that under section 167 of the Indian Evidence Act we have no power to deal with the case on the evidence apart from the depositions, but we are not prepared to accept this argument.

Appeal dismissed.

J. V. W.

BENGAL SECRETARIAT LIBRARY

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

RAM CHAND CHATTERJEE (PETITIONER) v. HANIF SHEIKH (OPPOSITE PARTY).*

1893 *Nov.* 17.

Witness—Examination of witnesses—Cross-examination—Right of co-accused to cross-examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.

One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.

THE petitioner Ram Chand Chatterjee was employed as a mohurrir or Head Assistant in the Moheshpore Silk Factory belonging to Messrs. Lewis, Payne and Company, and he was charged under s. 381 of the Penal Code with the theft from the godowns of the factory of a quantity of *chassams* (cocoons), which he was observed by the complainant Hanif Sheikh, a sirdar on the factory, to deliver to one Natoo Behari Chatterjee, who was at the same time charged under s. 411 of the Penal Code with dishonestly receiving the stolen property, knowing it to

* Criminal Revision, No. 635 of 1893, against the order passed by R. H. Anderson, Esq., Officiating Sessions Judge of Murshidabad, dated the 13th September 1893, affirming the order of Babu Nogendro Nath Pal Chowdhry, Deputy Magistrate of Berhampore, dated the 26th of August 1893.

1893

RAM CHAND CHATTERJEE v. HANIF SHEIKH.

have been stolen, and who had been seized by Hanif and some other servants of the factory (whose attention had been called by Hanif to what was going on), and taken to Berhampore to Mr. Gallois, the General Manager of the factory, by whom the matter was placed in the hands of the police; the police investigation resulting in the accused being charged as above.

Both the accused pleaded not guilty. Natoo Behari stated that he had purchased the *chassams* from Ram Chand, and whilst he was taking away what he had purchased he was seized upon and taken to the Manager. Ram Chand stated that he was on bad terms with the sirdars, the witnesses for the prosecution, and that the case was got up by them; he denied knowing anything of the *chassams*. The Deputy Magistrate who tried the case found that Natoo's story was probably true, and that the evidence adduced for the prosecution did not show any bad faith or dishonesty on Natoo's part; and he accordingly acquitted him under s. 258 of the Criminal Procedure Code. He found Ram Chand guilty of the offence with which he was charged, and sentenced him to six months' rigorous imprisonment: this sentence was confirmed by the Sessions Judge on an appeal by Ram Chand from the conviction.

Ram Chand then petitioned the High Court against the conviction and sentence on various grounds, the only one material to this report being that he "should have been allowed to cross-examine the witnesses examined by Natoo Behari for his defence."

Babu *Boido Nath Dutt* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

Babu *Boido Nath Dutt*:—Natoo and Ram Chand were the two accused. Natoo tried to throw the whole guilt on Ram Chand, and for that purpose and with that intent examined witnesses to prove that Ram Chand had sold the *chassams* (cocoons) to him. Natoo was therefore an adverse party within the meaning of s. 137 of the Evidence Act, and Ram Chand had therefore the right to cross-examine the witnesses examined by Natoo; *Lord* v. *Colvin* (1) is in favour of my contention. Ram Chand has therefore been prejudiced by the refusal of the Magistrate to allow

(1) 3 Drew, 222.

him to cross-examine Natoo's witnesses. The Judge in convicting Ram Chand has relied on the evidence of Natoo's witnesses, which was under the circumstances illegal.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown:—An accused person has no right to cross-examine the witnesses of a co-accused. A co-accused can never be said to be in the position of an adverse party, and there is no right, therefore, to cross-examine witnesses produced by such a party—See *Queen* v. *Surroop Chunder Paul* (1).

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

In this case it appears that the co-accused called certain witnesses. The case of the co-accused was one we think adverse to that of the applicant before us. The applicant before us says that he applied to be allowed to cross-examine those witnesses, but was not allowed to do so. The statement that he was not allowed to do so is made on affidavit, and is not contradicted by the Deputy Magistrate. We think there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be, practically, that a Court might act upon evidence which was not subjected to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by the adverse party. That being so, we set aside the conviction and sentence, and direct the Deputy Magistrate to recall those witnesses who had been called by Natoo Behari Chatterjee, and give the applicant before us an opportunity of cross-examining those witnesses. He will then reconsider the case with reference to such evidence as may be elicited by such cross-examination, and dispose of it according to law. As no other witnesses were tendered than those examined, we do not think it right to allow other witnesses to be called.

J. V. W.

(1) 12 W. R. Cr., 75.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Trevelyan, and Mr. Justice Rampini.

1893
Dec. 11.

BECHU SHEIKH, 2ND PARTY (PETITIONER), *v.* DEB KUMARI DASI AND ANOTHER, 1ST PARTY (OPPOSITE PARTY).*

Criminal Procedure Code (Act X of 1882), *s.* 145—"*Parties concerned in dispute*"—*Death of one of original parties—Substitution of party without fresh proceeding under s.* 145—*Possession at time of institution of proceeding or at time of final order—Criminal Procedure Code, s.* 537.

In a proceeding under s. 145 of the Code of Criminal Procedure recorded on 27th April 1893, *A.* and *B.* were respectively made first and second parties, and were ordered to put in statements of their claims to the land in dispute, which they accordingly did. *B* died on 24th May 1893. In his statement filed on the 31st May, *A.* disclaimed any interest in the land, but stated that his mother, *D. K.* (who had been a party concerned in the dispute which led to the original proceeding), was the owner and in possession of it. On 1st June *B. S.* applied to be substituted as a party in place of his father *B.* *D. K.* and *B. S.* were made parties without any fresh proceeding under s. 145 of the Code. The case was heard on 27th June and 7th July, and on 17th July the Magistrate found as regards the possession in favour of *D. K.* *Held* by PETHERAM, C.J., and TREVELYAN, J. (RAMPINI, J. dissenting), that since the possession to be enquired into was the possession at the time of the initiation of the proceedings, the words "parties concerned in the dispute" meant parties concerned at that time: there was no power in such a proceeding to introduce parties who were not concerned in the original dispute. No order could therefore be made against *B. S.*, and the proceedings were bad as against him.

Per RAMPINI, J.—The preliminary proceeding under s. 145 of the Code may, and in many cases must, partake of the character of a general citation to all the parties concerned in the dispute to appear, and it is not necessary for the Magistrate to confine his final order as to possession to the parties whom he may have named in the preliminary proceeding. The Magistrate had power to substitute the name of *B. S.* for that of his father without commencing the proceedings *de novo*. The alteration in s. 145 of Act X of 1882, the present Criminal Procedure Code, of the language of s. 530 of the old Code, Act X of 1872, implies that the

* Criminal Revision No. 521 of 1893, against the order passed by Babu Jaggo Bundho Khan, Deputy Magistrate of Faridpur, dated the 17th July 1893.

Magistrate is to decide on the possession, not at the time of the initiation of the proceedings, but at the time of recording the evidence. If there was any error in the proceedings, it was one cured by s. 537 of the Code.

THE following were the facts of this case :—

In the year 1891 a dispute arose as to the possession of a piece of chur land bounded on the north by a *halat*, on the south by *belbharti* land, on the east by a piece of water known as Dhole Samudar, and on the west also by *belbharti* land within the jurisdiction of the Kotwali police in pergana Jelalpore in district Faridpur, and a proceeding under section 145 of the Code of Criminal Procedure was recorded by Babu Ganendra Nath Lahiri, one of the Deputy Magistrates at Faridpur. Khondkar Hasmat Ali *alias* Kokra Mia and others were made the 1st party and Deb Kumari Dasi and others the 2nd party, and on the 12th May 1891 an order was made under section 146 of the Code in respect of the said land. Badaruddin Sheikh, the father of the petitioner, Bechu Sheikh, had been in possession as a *jotedar* for a large number of years of land lying towards the east of the land which formed the subject of the said order under section 146 of the Code, and which land was gradually increasing in size by accretion, his original *jote* being towards the south of the said accreted land.

In 1892 the petitioner along with other men, who were mostly *burgaets* of Badaruddin Sheik, was arrested and prosecuted, on the complaint of the manager of the said attached land under section 146 on charges under sections 447 and 389 of the Penal Code, for taking paddy from the land lying towards the east of the said attached land, the allegation of the prosecution being that the said land formed a part of the attached land; but the petitioner and the other accused were acquitted on the ground that though they had been arrested while on the land and actually taking away the paddy, the land was not a part of the attached land, and that they had been from before in possession of the same, and the cutting and taking away of the crop were not unlawful. In December 1892 one Abinash Chandra Sikdar and others having attempted to disturb the possession of the petitioner and his father, Badaruddin Sheikh, and there having been a dispute which might have led to a breach of the peace,

1893

BECHU SHEIKH v. DEB KUMARI DASI.

proceedings under section 107 of the Code of Criminal Procedure were instituted, the said Abinash Chandra Sikdar being one of the parties, and Badaruddin was on the 31st January 1893 directed by the Deputy Magistrate to execute a bond with a surety to keep the peace for one year; but on application to the District Magistrate against the said order he was pleased to direct the order of the Deputy Magistrate to be cancelled, holding that Badaruddin was in possession of the land to the east of the attached land.

On the 27th April the Magistrate of the district recorded the following proceeding under section 145 of the Code :—

"Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate under section 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute :—

First party—Abinash Chandra Sikdar of Kanaipur, station Faridpur.
Second party—Badaruddin of Kafura, station Faridpur."

In accordance with this order, Badaruddin, on 17th May 1893, filed a written statement in which he claimed to be in possession of the land in dispute. Badaruddin died on 24th May 1893. On the 31st May, Abinash Chandra filed a written statement in which he disclaimed any right to, or possession of, the land, but stated that his mother, Deb Kumari Dasi, was the owner and in possession of the same, and she was made a party and allowed to put in a written statement claiming the land and alleging her continued possession. On the same day one Bolaki Sheikh applied to be made a party to the proceedings, and he was also made a party and put in a written statement also claiming the land and alleging possession of it. On the 1st June Bechu Sheikh on his own petition was made a party in place of his father

Badaruddin. Deb Kumari, Bechu, and Bolaki Shaikh were made parties without any fresh proceedings under s. 145 of the Code.

On the 17th July the Deputy Magistrate made the following order, holding that Deb Kumari was entitled to possession:—

"Having analyzed and weighed the evidence adduced by the three parties, it appears to me clear that the first party is in possession of the disputed land through her tenants, and the second and third parties only laid claims, and false claims, as appears from the record of the case. I have also examined carefully the document filed by the parties, and find that on 26th Kartic 1296 B.S., the first party gave an *amulnama* to Kangali Kuran and others, and that on 29th Pous 1297 B.S., the above-named tenants executed a *kabuliat* to the first party. The first party, it seems to me, has been in possession of the land in dispute, and the second and third parties are trying to forcibly take possession of the same by setting up false claims. Under these circumstances I am fully satisfied of the actual possession of the first party. I therefore order that the first party, Deb Kumari Dasi and her tenants Kuran Kangali and others, would be entitled to retain possession of the land bounded as follows:—West by attached land, south by Kafura and Dariapur, east by Sib Nath Chowdhry's ghat, a line drawn from Sib Nath Chowdhry's ghat towards the north, and north by the chur land of Deb Kumari Dasi, until evicted therefrom by due course of law, and I forbid all disturbance of such possession until such eviction."

The *Advocate-General* (Sir *Charles Paul*) for the petitioner.

Mr. *C. P. Hill* and Babu *Girja Shunker Mozumdar* for Deb Kumari Dasi.

Babu *Nogendra Nath Mitter* for Bolaki Sheikh.

The *Advocate-General* (Sir *Charles Paul*) for the petitioner:—I submit no order can be made in favour of or against any person not named in the initiatory proceeding drawn up by the Magistrate. It is true my client asked to be made a party on the death of his father, but on a question of jurisdiction consent or waiver is immaterial. It has been so held in numerous cases. See *Regina* v. *Gibson* (1), *Queen* v. *Bhola Nath Sen* (2), *Government of Bengal* v. *Heera Lall Doss* (3), *Hossein Buksh* v. *Empress* (4). Section 537, Criminal Procedure Code, has no application in a matter of this description. The inquiry as to possession

(1) 16 Cox C. C., 181.
(2) I. L. R., 2 Calc., 23.
(3) 17 W. R. Cr., 39.
(4) I. L. R., 6 Calc., 96; 6 C. L. R., 521.

1893

BECHU SHEIKH v. DEB KUMARI DASI.

must be limited to the time when the proceedings commenced, according to a series of decisions of this Court beginning with *In the matter of the petition of Pirthiram Choudhry* (1) and ending with *Ambler* v. *Pushong* (2). I have on several occasions argued that the inquiry ought to be directed to the time when the Magistrate gives his decision, but this Court has not accepted that view.

I contend, further, that the Code does not provide for intervenors coming in in a proceeding of this nature. See *In the matter of the petition of Kunund Narain Bhoop* (3).

Mr. *C. P. Hill, contra* :—It has not been shown that the petitioner has been prejudiced. He applied to be made a party on the death of his father, and on his application being granted, he adduced evidence to prove his possession. No objection was taken before the Magistrate as to his want of jurisdiction, and as this is a proceeding of a *quasi* criminal nature, he ought to be precluded from taking this objection now. In any case, s. 537, Criminal Procedure Code, would cure the defect, if any. A proceeding under s. 145, Criminal Procedure Code, must be more or less in the nature of a general citation,* and there is authority for the proposition that intervenors have the right to come in. See *Annondo Moyee Debee* v. *Luchmun Pershad Gogo* (4). The contrary view might deprive a real owner from proving his claim and otherwise prejudicially affect him. The decision in *In the matter of the petition of Kunund Narain Bhoop* (3) was under s. 530 of the Code of 1872, the provisions of which were different from those of s. 145 of the present Code.

Then, as regards the scope of the inquiry, the Magistrate should consider who was in possession at the time of passing final orders, or at any rate at the time of recording evidence. The introduction of the word 'then' in the present Code shows this.

The case was heard before TREVELYAN and RAMPINI, JJ., who differed in opinion, and it was referred to the Chief Justice, who agreed with TREVELYAN, J.

* In this connection see the case of *Ram Chandra Dass* v. *Monohur Roy*, I. L. R., 21 Calc., 29, which however was not cited in argument.—Rep. note.

(1) 20 W. R. Cr., 51.
(2) I. L. R., 11 Calc., 365.
(3) I. L. R., 4 Calc., 650.
(4) 2 C. L. R., 264.

The following judgments were delivered :—

TREVELYAN, J.—On the 26th of April 1893 the Magistrate of Faridpur recorded a proceeding under section 145, Criminal Procedure Code, regarding certain lands situate in his district.

This proceeding was as follows :—Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate under section 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute :—

First party—Abinash Chandra Sirdar of Kanaipur, station Faridpur.

Second party.—Badaruddin of Kafura, station Faridpur.

Notices were issued in accordance with this proceeding.

On the 17th of May Badaruddin filed a written statement claiming the property in dispute.

On the 24th of May, Badaruddin died.

On the 31st May, Abinash Chandra Sikdar filed a written statement disclaiming any interest in the land in dispute, and asserting that his mother, Deb Kumari Dasi, was the owner and in possession thereof.

On the same day Deb Kumari put in a written statement claiming the property and disputing the right of the second party.

On the 1st of June Sheikh Bechu, the son of Badaruddin, presented a petition asking to be substituted in the proceeding in the place of his father. An order was made accordingly, but no fresh proceeding was recorded. Evidence was taken, and on the 17th

1893

BECHU SHEIKH v. DEB KUMARI DASI.

of July 1893, the Deputy Magistrate who tried the case made an order in favour of the first party, who is described in his order as "Deb Kumari Dasi, mother of Abinash Chandra Sikdar." The second party was described in such order as "Badaruddin Sheikh, deceased, and his son, Bechu Sheikh."

Bechu Sheikh has applied to us to set aside this order on two grounds. The first ground is, that the boundaries given in the order do not accord with those given in the order initiating proceedings. As to this it is agreed that, if the order is in other respects good, it may be amended by altering the boundaries to those mentioned in the order initiating proceedings.

The second ground is, that as Bechu Sheikh was not mentioned in the order initiating proceedings, and, his father being then alive, could not have then been concerned in the dispute, no order could be made against him without a fresh order initiating proceedings being drawn up.

It is contended that his application to be made a party cannot give jurisdiction, and that he is competent to take this objection.

It is also objected that the substitution of Deb Kumari for her son vitiates the final order. As Deb Kumari was concerned in the dispute which led to the original proceeding, and was actually mentioned in the proceeding, this objection is not, in my opinion, a valid one. I think, however, that it is clear that no order can be made against Bechu Sheikh. The cases beginning so far back as *In the matter of the petition of Pirthiram Chowdhry* (1) under the old Code and ending with *Ambler* v. *Fushong* (2), and the cases which have followed it under the new Code, show that the possession to be inquired into is the possession at the time of the initiation of the proceeding. As far as I know, the Court has always taken this view of the section, and in a very recent case Mr. Justice Prinsep and I, when invited to do so by the Advocate-General, declined to refer the question to a Full Bench. These cases, I think, show clearly that the Magistrate's inquiry must be devoted only to the state of affairs in existence at the time of the initiation of the proceedings. The reasoning which led to these decisions would equally show that the words "parties concerned in such dispute" must mean parties concerned at the time of the initiation of the proceedings.

(1) 20 W. R. Cr., 51. (2) I. L. R., 11 Calc., 365.

There is no power to substitute father for son, or in any way to introduce parties who were not concerned in the original dispute. In civil cases the Courts have no power, apart from statutory provisions, to revive suits on the death of parties. Much less would they have the power in cases conducted under a criminal procedure. If the power to substitute be held to apply, there seems to be no reason why all the provisions of the Civil Procedure Code should not equally apply, and if these powers of Civil Courts are to be here introduced, they might equally apply to the cases of offences.

Authority is not wanting for the conclusion at which I have arrived. In *In the matter of the petition of Kunund Narain Bhoop* (1), Mr. Justice Ainslie says:—"There is no provision in the Criminal Procedure Code for allowing an intervenor to come in in the middle of proceedings held by a Magistrate under section 530. As to such third party, the Magistrate has no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the only ground upon which he can enter upon an inquiry as to the possession of such third party at the date of the commencement of the pending proceedings, is wanting. As to anything of later date he may take such steps in a separate proceeding as circumstances call for and the law allows."

We were referred to a decision of Mr. Justice Markby and Mr. Justice Prinsep, in *Annondo Moyee Debee* v. *Luchmun Pershad Gogo* (2), as enunciating a contrary proposition. That case is not in the least opposed to the case of *Kunund Narain Bhoop*. No person was there substituted for a deceased person. There is merely an *obiter dictum* that it would have been probably more regular to have postponed the case so as to have enabled some representative of the deceased to appear: at the most this is an *obiter dictum* in a case which was not argued and in which no one appeared.

I am equally clear with regard to the other question argued. I do not think Bechu Sheikh's action in any way justified the order made against him.

(1) I. L. R., 4 Calc., 650, at p. 654.
(2) 2 C. L. R., 264.

1893

BECHU SHEIKH v. DEB KUMARI DASI.

It has been frequently held in this Court that a Magistrate has no jurisdiction under section 145 unless there be in existence an initiatory proceeding in compliance with the law showing that there are grounds for supposing that a dispute exists, and that such dispute is likely to cause a breach of the peace.

As Mr. Justice Ainslie points out in the case of *Kunund Narain Bhoop*, at page 652 of the report: "In many cases it has been held that a proceeding such as is required by section 530 (of the old Code) is a *necessary preliminary*." In the case of *Kasi Kishor Roy* v. *Tarini Kant Lahiri* (1), in dealing with the Act of 1861, Mr. Justice Norman says: "Now, it has been pointed out in many cases before this Court, more particularly in the case of *Dewan Elahi Newaz Khan* v. *Sulurunnissa* (2), that it is a condition precedent to the powers of a Magistrate to take up and decide a case under section 318, that he should decide judicially that he is satisfied that a dispute likely to induce a breach of the peace exists, and that he should record a proceeding stating the grounds of his being so satisfied. Unless, and until, he shall have decided that preliminary matter, he has no jurisdiction to take up the case and decide the question of possession under section 318": see also *In the matter of the petition of Kishore Mohan Roy* (3). There is no practical difference on this question between the Criminal Procedure Code of 1861 and the present one. As far as I am aware, this has been always held to be a question of jurisdiction. That being so, jurisdiction cannot be given by consent, waiver, or application.

It might be equally argued that a person who had not committed an offence could ask to be tried in the place of one who was charged but had died; where the dispute is as to property it might suit a person to be so tried.

I do not think that the Magistrate had any power to decide any question with regard to a person who was not concerned in the dispute at the time of the initiation of the proceeding, and I would make this rule absolute.

As my learned colleague differs from me, the case must be referred to a third Judge.

(1) 3 B. L. R. A. Cr., 76, at p. 78. (2) 5 W. R. Cr., 14.

(3) 19 W. R. Cr., 10.

RAMPINI, J.—The rule in this case was obtained by the petitioner Sheikh Bechu on two grounds: (1) that the land dealt with in the final order was not the land in respect of which the initiatory proceeding was drawn up; (2) that the parties with regard to whom the final order was made were not the parties mentioned in the Magistrate's preliminary proceeding.

My learned colleague and I agreed that the first of these objections may be met by altering the order of the Magistrate declaring possession and by restricting it to the land described in his preliminary proceeding.

The circumstances under which Deb Kumari and the petitioner became parties to the proceeding are detailed in my learned colleague's judgment, and I need not recapitulate them. I would only add that there was a third party, named Bolaki, made a party to the proceedings, and that the evidence was recorded by the Magistrate on the 27th June and 7th July, and his final order was passed on the 17th July.

Now, it has been said that no order under section 145, Criminal Procedure Code, can be made in favour of, or against, any person not named in the initiatory proceeding drawn up by the Magistrate. I am unable to agree to this. No grounds for such a contention are to be found in the provisions of section 145. The section is worded in very general terms. All that would seem to be necessary to give the Magistrate jurisdiction is that he should be satisfied that a dispute likely to cause a breach of the peace exists regarding certain tangible immoveable property or the boundaries thereof; and his duty is then to make an order in writing, stating the grounds of his being so satisfied, and calling on the parties concerned to put in written statements of their respective claims as to actual possession. The section does not say that the Magistrate must in his proceeding name or describe the parties concerned in the dispute in any way, and it seems to me that it would be unreasonable to expect a Magistrate to do so. In most cases he does not know who the parties concerned in the dispute are until they appear before him. He has no means of knowing this. All he knows, and all I think he need concern himself with, is the fact of the dispute and the likelihood of a breach of the peace; and it is for the parties who claim possession

1893

BECHU SHEIKH v. DEB KUMARI DASI.

to come forward and represent to the Magistrate their claims to the land. In short, I am of opinion that the preliminary proceeding referred to in section 145 may, and in many cases must necessarily, partake of the character of a general citation to the parties concerned in the dispute to appear before him; and that it is not necessary for the Magistrate to confine his final order to the parties whom by way of supererogation he may have named in his preliminary proceeding.

To hold otherwise would seem to me to lead to this, that any mistake made by the Magistrate in the preliminary proceeding about matters of which he can know nothing until informed by the parties, cannot be corrected by him, and must vitiate the entire proceedings.

No doubt the view that the preliminary proceeding is of the nature of a general citation is opposed to that expressed by Mr. Justice Ainslie in the case of *In the matter of the petition of Kunund Narain Bhoop* (1), but it will be observed that Mr. Justice Ainslie's judgment refers to the provisions of section 530 of Act X of 1872, the provisions of which are different from those of section 145 of Act X of 1882. In fact, Mr. Justice Ainslie's judgment may be regarded as an authority in support of the view above expressed by me; for Mr. Justice Ainslie's contention that the Magistrate's order must be confined to the persons named in the preliminary proceeding is to some extent based on the language of section 531 of the old Code, which was to the effect that "if the Magistrate decides that *neither of the parties* is in possession, &c." Mr. Justice Ainslie says:—"Had it been intended that the declaration should operate as universally binding, the words would have been that no party is in possession." But the terms of the section referred to by Ainslie, J. have now been altered, perhaps to obviate this objection of Mr. Justice Ainslie's, and to show that the declaration or citation is intended to be a general one. At all events, the words "neither party is in possession, &c.," have now disappeared. The words of section 146 are, "if the Magistrate decides that *none of the parties* is then in such possession." In other words, the terms of this section are now just such as, according to Mr. Justice Ainslie, would have led him to the conclusion that an

(1) I. L. R., 4 Calc., 650.

order under section 530 or 145 need not be confined to the parties named in the preliminary proceeding.

It follows that in this case, on the view of the provisions of section 145 which I take, neither Deb Kumari nor Sheikh Bechu can be regarded as an "intervenor." They are, in my opinion, to be regarded as parties concerned in the dispute who appeared before the Magistrate as soon as they learned that their interests were affected, and before any evidence had been recorded by him. Bechu, the petitioner, appeared on the 1st June, his father having died on the 24th May.

Now, it has been said that there is no provision for the substitution of Bechu's name in the place of his father. But (i) no procedure of any kind is prescribed in section 145, or in any section of Chapter XII of the Criminal Procedure Code; if a Magistrate is bound to confine himself to the procedure prescribed by section 145 or Chapter XII, it follows that he can dispose of no case under that section or chapter, there being no procedure at all prescribed, *e.g.*, for the issue of notices, the recording of evidence, the summoning of witnesses, or for any step the Magistrate may take in such cases; (ii) though the provisions of the Civil Procedure Code may not be applicable to proceedings under section 145, the subject of such a proceeding is one of a *quasi* civil nature. On the other hand, a proceeding under section 145 is not a criminal trial. There is no "accused." No "offence" has been committed. Therefore, the provisions of the Criminal Procedure Code in their entirety cannot be applicable to such a proceeding. In such a proceeding, it seems to me, much must necessarily be left to the discretion of the Magistrate. The Legislature appears to have intentionally left it unfettered, and it is our duty to give effect to the intentions of the Legislature; (iii) the cases of *Annondo Moyee Debee* v *Luchmun Pershad Gogo* (1) and *Jithahan* v. *Bansrup Dhobi* (2) show that on the death of a party to a section 145 proceeding, his heir may be substituted in his stead, and that it is not necessary to commence the proceedings *de novo*.

Then, as to the time which the Magistrate is to have regard to when deciding as to the actual possession of the land, the section

(1) 2 C. L. R., 261. (2) 6 C. L. R., 193.

BECHU SHEIKH v. DEB KUMARI DASI.

says the Magistrate is, if possible, "to decide which of the parties is *then* in possession" of the subject of dispute. In this respect the wording of the section is altered from that of section 530, Act X of 1872. This, therefore, seems to imply that the Magistrate is to consider who is in possession at the time of recording the evidence. But even if the rulings which lay down that the possession which a Magistrate is to find and support is possession at the time of the institution of the proceedings, and not possession at the time of his passing final orders in the matter, be followed, I do not see how this affects this case. Nobody says that there has been any change of possession between the opposing parties, and the rulings cited all refer to such a change of, or such a dispute as to, possession. According to Sheikh Bechu, the petitioner, he and his father have all along been in possession. On the death of his father, he succeeded him as his heir, and according to the civil law he is entitled to regard his father's possession as his own. There has in the case of Bechu been no such change of possession as the rulings cited in my learned colleague's judgment refer to. However this may be, whether there has been a change of possession as regards Bechu, there has been none as regards Deb Kumari, whom the Magistrate has held to have been in possession all along. On the Magistrate's finding she was in possession at the time of the initiation of the proceedings, at the time of the recording of the evidence, and at the time of the Magistrate's final order. The proceedings are therefore quite regular as far as Deb Kumari is concerned. Whether or not the objection would have had any force if the Magistrate's final order had been in favour of Bechu, it would seem to me to have none, when it is Deb Kumari whose possession of the land has been declared.

Then, the objection as to the change of parties is one of a highly technical character and one entirely devoid of merit. If it be said that Deb Kumari has wrongly been made a party to the proceedings, then Bechu, the petitioner, is in exactly the same position, or a worse one. If it be Bechu who, it is contended, should not have been made a party, then it is to be remembered he was made a party at his own request. He appeared voluntarily. When he appeared, he raised no objection to the proceedings. As already pointed out, both Deb Kumari and Bechu were made parties before

any evidence was recorded, and Bechu adduced his evidence and fought the case against Deb Kumari to the best of his ability. It is only after the case has on the evidence been decided against him that he comes forward and impugns their regularity. He is, or at all events in my opinion ought to be, estopped from now raising the plea he does.

Finally, the provisions of section 537, Criminal Procedure Code, are in my opinion applicable to the case. The objection as to the change of parties does not affect the merits of the case. It has not been contended before us that it does so. No failure of justice has been said, or appears, to have taken place. I therefore think that the order of the Magistrate should be altered so as to restrict it to the land described in the preliminary proceeding, and that in other respects the rule should be discharged.

PETHERAM, C.J.—I agree with Mr. Justice Trevelyan, and for the reasons given by him, that this rule should be made absolute. Mr. Justice Rampini thinks that an order of a Magistrate requiring the parties concerned in the dispute to attend his Court and to put in written statements is in the nature of a general citation to all parties concerned in the dispute to appear before him, and that when such an order has been made, the Magistrate may deal with the possession of any person who may appear before him, or indeed, as I think must be the case if this is the correct view of the decision, any person concerned in the dispute, whether such person does appear before him or not, and though no order has ever been made upon him to attend, and though he may never have heard of the order at all. In this view of the section I am unable to agree. As far as I can learn, such a construction has never been acted upon down to the present time, and I do not think it is justified by the words of the section itself.

It is, I think, clear that by "parties concerned in such dispute" in the 1st paragraph of the section, parties claiming to be in possession of the subject-matter of the dispute are intended, inasmuch as what they are required to do is to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and what the Magistrate is empowered to do is to find whether any, and which, of the parties is then

1893

BECHU SHEIKH v. DEB KUMARI DASI.

in possession of the land in dispute. Mr. Justice Rampini thinks that the word "parties" includes any person who up to the time of the commencement of the inquiry, that is, before any of the witnesses are called, sets up a claim to be in possession, and that it is not confined to the individuals to whom the order was addressed by name; but I cannot think that that is the case, as the last paragraph of the section provides that any party so required to attend shall have certain rights, and the language there used seems to me to indicate conclusively that the Legislature were dealing with *individuals* who had been required to attend by the order of the Magistrate, *i.e.*, the persons or parties to whom it was addressed, and not to any member of the public whom it might concern.

Mr. Hill, in showing cause against the rule before me, contended that the order made upon the petition of Bechu, the present applicant, that he should be made a party to the proceedings in the place of his father, was in effect an order made upon him under the section to attend the Court and put in his written statement, and that if there was any irregularity, it was one which had caused no miscarriage of justice and was cured by section 537 of the Code. As to this I think it enough to say that the order of the Magistrate calling on a party to attend and put in a written statement rests on his finding that there exists at the time a dispute likely to cause a breach of the peace, and that at the time to which both the Police report and the finding by the Magistrate upon it related, Bechu was not a person who claimed to be interested in the subject-matter of the dispute at all, and so was not a person who on the basis of that finding could be required to attend the Court of the Magistrate or to put in a written statement.

Rule absolute.

J. V. W.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Macpherson, and Mr. Justice Trevelyan.

RAMDEO AND ANOTHER *v.* POKHIRAM.*

1893
Sept. 12.

Set off—Presidency Towns Small Cause Court Act (XV of 1882), *section* 18, *explanation I—"Admitted set off"—Debt—Civil Procedure Code (Act XIV of* 1882), *section* 111—*Jurisdiction.*

The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to Rs. 2,148, but they deducted from this sum of Rs. 2,148, by way of set off, a sum of Rs. 500 which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim to Rs. 1,648. The defendant admitted that the Rs. 500 was due to him by the plaintiffs, but did not, either before suit or at the trial, agree to its being set off against the plaintiffs' claim. *Held* by MACPHERSON and TREVELYAN, JJ. (PETHERAM, C. J., dissenting) that the sum of Rs. 500 could not, under explanation I of section 18 of Act XV of 1882, be set off, and that the suit must be dismissed as being beyond the jurisdiction of the Court.

REFERENCE from the Calcutta Court of Small Causes under section 617 of the Code of Civil Procedure.

The following was the order of reference:—

"The plaint in this case is as follows:—That on the 21st April 1892 the plaintiffs sold to the defendants '100,000 E. bags 40 x 29 Porter, 8 shots, weight 1 lb 12 oz., unhemmed, at Rs. 20-10 per 100 bags loose, with option for other sizes as in the contract specified, of any mill's make Soorah, for delivery in two months, May and June 1892.'

2. "That in terms of the contract the plaintiffs tendered to the defendant on the due date in May 1892 (having previously thereto intimated their readiness to deliver the bags in terms of the contract) 50,000 gunny bags, equality 40 x 29 (no option of sizes having been exercised), and demanded from the defendant value of the same in terms of the contract.

* Small Cause Court Reference No. 5 of 1893, made by A. P. Handley, Esq., Officiating Chief Judge of the Court of Small Causes of Calcutta.

1893

RAMDEO v. POKHIRAM.

3. "That in consequence of the defendant's refusal to take delivery of the goods tendered as aforesaid, the plaintiffs have sustained damages to the extent of Rs. 2,148.

4. "That in terms of two other contracts, No. 521, dated the 22nd February 1892, and No. 523, dated the 9th March 1892, the latter being in settlement of the contract of the 22nd February, and the ascertainment of the difference payable to the defendant by the plaintiffs thereunder, the sum of Rs. 500 is still due and owing by the plaintiffs to the defendant for the deliveries due in May and June under the contract of the 22nd February 1892.

5. "That allowing the defendant credit for this sum of Rs. 500 admittedly due to the defendant against the damages payable by them to the plaintiffs as specified in paragraphs 1, 2, and 3, the sum of Rs. 1,648 is still due and owing by the defendant to the plaintiffs, which on demand the plaintiffs have failed to recover.

"The plaintiffs therefore pray for judgment for Rs. 1,648 with all costs incurred.

"At the hearing of this case before me on the 8th August 1893, Mr. Mendes for the defendant admitted the contract sued on, admitted the tender by the plaintiffs as alleged, but denied that the damages were rightly assessed at Rs. 2,148. He also admitted the two contracts Nos. 521 and 523, and admitted that under those two contracts the defendant was entitled to receive from the plaintiffs the sum of Rs. 500, but he denied that the defendant had agreed to allow the plaintiffs to deduct the sum of Rs. 500 from the sum of Rs. 2,148 due to the plaintiffs, and he submitted that the plaintiffs had no right to deduct this sum, and that the suit should be dismissed, being a suit for Rs. 2,148 and beyond the jurisdiction of this Court.

"Babu O. C. Bose, for the plaintiffs, admitted that the deduction of the sum of Rs. 500 had been made without the knowledge and consent of the defendant, but submitted that under section 18, explanation I, of Act XV of 1882 the plaintiffs had a right to deduct this sum, and that the suit was therefore for Rs. 1,648 and within the jurisdiction of this Court.

"Both parties have asked me to refer this point for the opinion of the High Court. The cases of *Walesby* v. *Goulston* (1),

(1) L. R., 1 C. P., 567.

Avards v. *Rhodes* (1), and *Brojendra Nath Dass* v. *The Budge-Budge Jute Mills* (2), were cited and argued before me. It appears to me that the latter case has very little bearing upon the point. In that case a defendant wished to set off a sum of Rs. 2,738-4 arising out of the same transaction against the plaintiff's claim, and it was held that he could not do so, the sum being in excess of this Court's jurisdiction. It was laid down by the High Court that an equitable right of set off exists in this country when both the claims of the plaintiff and that of the defendant arise *out of the same transaction.* In the present case there are three separate contracts made on different dates, and the plaintiffs deduct a sum payable to the defendant under two of them from a sum payable by the defendant to the plaintiffs under the third. The case of *Walesby* v. *Goulston* has been relied on by both the parties to this suit. In that case the plaintiff brought an action for £51 17*s.* 11*d.* in a superior court, the defendant pleaded a set off; the plaintiff admitted the set off of £32 3*s.* 2*d.*, and obtained a decree for the balance £19 14*s.* 9*d.*, and claimed his costs. It was held that he was entitled to his costs, as the set off had not been admitted before action. Erle, C.J., on page 569 of the report said:—"The 19 and 20 Vic., Cap. 108, section 24, gives the County Court jurisdiction where in any action the debt or demand consists of a balance not exceeding £50 after an admitted set off. I interpret this as meaning a set off which the plaintiff chooses to admit at the time he sues in the County Court. No doubt the present plaintiff might have admitted the set off and issued a plaint in the County Court, but in my opinion he had an option whether he would make the admission or not." At page 570 of the report Erle, C.J., said:—'I think there is great doubt whether the set off can be admitted by one party only, but here the plaintiff himself did not admit the set off before action.' In the above case Erle, C.J., expresses great doubt as to whether a set off can be admitted by one party only. The case of *Avards* v. *Rhodes* seems to have most bearing on this point. There the plaintiff's particulars of demand stated a debt originally of £57, and admitted that the defendant was

(1) 8 Exch., 312; 22 L. J., Exch., 106.
(2) I. L. R., 20 Calc., 527.

1893

RAMDEO v. POKHIRAM.

entitled to a set off of £15; it was held that the County Court had no jurisdiction to try the suit.

"I am of opinion that the defendant's contention is a sound one, and that the plaintiffs cannot, without the consent of the defendant, deduct the sum of Rs. 500 from their damages so as to bring the sum within the jurisdiction of this Court. My judgment is contingent on the opinion of the High Court on the following point:—Whether in this suit the plaintiffs are entitled under s. 18, Explanation I, of Act XV of 1882, to deduct from their claim of Rs. 2,148 against the defendant, the sum of Rs. 500 due from them to the defendant under contracts Nos. 521 and 523 respectively, the defendant not consenting to such deduction, but admitting that Rs. 500 is the correct sum due to him from the plaintiffs under the said contracts Nos. 521 and 523?

"If the plaintiffs are entitled to deduct the said sum of Rs. 500, then this Court has jurisdiction to try the suit. If the plaintiffs are not entitled to deduct the said sum, then the suit must be dismissed for want of jurisdiction."

Mr. *T. A. Apcar* for the plaintiffs referred to *Percival* v. *Pedley* (1).

Mr. *Acworth* for defendant referred to *Hubbard* v. *Goodley* (2), *Walesby* v. *Goulston* (3), *Avards* v. *Rhodes* (4).

The following judgments were delivered by the Court (PETHERAM, C.J., and MACPHERSON and TREVELYAN, JJ.):—

MACPHERSON, J.—I think the case has been rightly decided, and I would answer the question submitted in the negative.

The amount or value of the subject-matter of the suit is Rs 2,148 and beyond the jurisdiction of the Court, but the plaintiffs deducting by way of set off a sum of Rs. 500 which was due by them to the defendant on account of a wholly different transaction, reduced their claim to Rs. 1,648. The defendant says that the sum of Rs. 500 is due to him, but he does not agree to its being set off against the plaintiffs' claim. The question is whether the plaintiffs are entitled to set off this sum so as to give the Small Cause Court jurisdiction, or in other words, whether

(1) L. R., 18 Q. B. D., 635.
(2) L. R, 25 Q. B. D., 156.
(3) L. R., 1 C. P., 567.
(4) 8 Exch, 312; 22 L. J., Exch., 106.

there is "a set off admitted by both parties" within the meaning of Explanation I, section 18 of the Small Cause Court Act (XV of 1882).

Clearly the defendant did not before suit or during the trial agree to the set off, but he admitted the debt of Rs. 500, if a person can be properly said to admit a debt which is due to himself. The question then seems to be reduced to this, whether the word "set off" in the section referred to is equivalent to "debt." I know of no authority for holding that it has that meaning, and the words "an admitted set off of any debt or demand claimed or recoverable by the defendant," in the corresponding sections of the County Courts' Acts of 1856 and 1888, certainly do not indicate that the two words mean the same thing. A sum of money due by the plaintiff to the defendant on a transaction independent of the one on which his claim is based is a debt, and a debt may be the subject of a set off. But it only becomes a set off under certain circumstances, one of which seems to be indicated by section 18, which requires that the set off should be admitted by both parties. The right to set off a debt against the plaintiff's demand is with the defendant. If he does not choose to claim the set off he does not forfeit his right to enforce payment of the debt by bringing a separate action. It is beyond controversy that a plaintiff cannot compel a defendant to plead a set off. I think that section 18 of the Small Cause Court Act was not intended to, and does not, extend the jurisdiction of the Small Cause Court so as to enable a plaintiff to prefer in it a disputed claim for a very large amount by setting off against that claim without the defendant's consent a debt which he owes to the defendant on a wholly different account, a debt which, if the defendant wished to enforce it, might be the subject-matter of a separate suit.

What is required to be admitted by both the parties is a set off, by which I understand a set off of a debt or demand, and not the debt or demand itself.

Section 47 of the County Courts Act of 1888 enacts that "where in any action the debt or demand claimed consists of a balance not exceeding £50 after an admitted set off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the

1893

RAMDEO v. POKHIRAM.

Court shall have jurisdiction to try such action." There was a provision to the same effect in the Act of 1856. It is clear that what must be admitted is the set off of a debt or demand, but there has been some discussion in the courts as to whether the words "an admitted set off" meant a set off admitted by both parties.

The Small Cause Court Act in force in this country places it beyond doubt that whatever may be meant by a set off, the admission must be by both parties. In *Walesby* v. *Goulston* (1) the plaintiff brought an action for £51, but recovered judgment for only £19, a set off having been admitted during trial for £32. The question arose whether he was entitled to his costs. Erle, C.J., held that he was entitled, and added: "I think there is great doubt whether a set off can be admitted by one party only, but here plaintiff did not admit it himself before action brought."

In *Percival* v. *Pedley* (2), Mathew and Cave, JJ., overruling Baron Huddleston, held that the words "admitted set off" meant a set off by the plaintiff only. But the words occurred in another section of the Act which allowed the defendant to apply for an order transferring the action for trial in the County Court when the claim "although it originally exceeded £50 is reduced by payment, admitted set off, or otherwise to a sum not exceeding £50."

In *Hubbard* v. *Goodley* (3), Huddleston, B., and Grantham, J., held that the words "an admitted set off" in section 47 meant a set off the existence of which is admitted by both parties and not merely by the plaintiff, and that the County Court had consequently no jurisdiction to try the action which was one for £56 reduced to £42 by a set off allowed in the plaint. The defendant, it is true, disputed the amount of the set off allowed, but the decision did not turn on that. The substantial question raised was whether the set off having been allowed by the plaintiff, the County Court had jurisdiction to entertain the action The case of *Percival* v. *Pedley* was distinguished. These cases being on a different statute are not of course exactly in point, but *Walesby* v. *Goulston* and *Hubbard* v. *Goodley* do support the view I take of section 18 of the Small Cause Court Act, which is that what

(1) L. R., 1 C. P., 567. (2) L. R., 18 Q. B. D., 635.
(3) L. R., 25 Q. B. D., 156.

must be admitted is a set off of something, and not the same thing which constitutes the set off. *Percival* v. *Pedley* does not conflict with this view, because if the words "by both parties" had followed the words "admitted set off," the decision might have been different.

TREVELYAN, J.—In my opinion from the facts stated by the learned Chief Judge of the Small Cause Court, the suit should be dismissed.

The whole question depends upon the meaning of the words "set off admitted by both parties." The cases cited to us make it clear that the admission must be before the suit. The question remains what must be admitted before suit? One contention is that it is an admission of an ascertained sum of money legally recoverable by the defendant from the plaintiff (see section 111 of the Civil Procedure Code). The other contention is that it is an admission that such a sum has been set off against the plaintiff's claim.

Of these two contentions I think the latter is preferable.

Although one ordinarily speaks of a debtor admitting a debt, it is not usual to speak of the creditor admitting the debt, and therefore it would be straining the meaning of words to say that the section means a debt admitted by both creditor and debtor. On the other hand, without forcing the language of the section, and without putting upon it an interpretation which would give the words other than their ordinary meaning, one might fairly speak of a creditor, as well as a debtor, admitting that a certain sum can properly be set off against a claim. An admission, to some extent, implies a statement against the interest of the party admitting, and if the latter construction be put on the section, the admission is against the interest of each party. If one admits that his claim is reducable by a certain amount, the other to some extent foregoes his right of suit with respect to his cross claim.

I do not think the question is by any means an easy one, but this is the construction I would put upon the section. It is true that the cases in England have not gone so far, but it has not been necessary in any of them to go so far, and there is not, as far as I am aware, anything in any of them to suggest that such a construction is incorrect.

1893

RAMDEO v. POKHIRAM.

In *Turner* v. *Berry* (1) Pollock, C.B., speaking of a set off, said: "It is in the nature of a cross action, and you cannot compel a man to set off his claim or accept credit for it against another." These words are cited with approval by Hawkins, J., in *Neale* v. *Clarke* (2). It seems to me that these words are equally applicable whether the debt is or is not admitted by the debtor.

In *Hubbard* v. *Goodly* (3), Huddleston, B., says, with reference to the words "admitted set off" in section 57 of the County Courts Act: "My opinion is that the words mean admitted by both parties—that each party admits there is a set off." As far as I can see, in using these words, Baron Huddleston had in his mind the construction which, as above stated, I prefer. It is true that he was construing an act of which the words were somewhat clearer, namely, "admitted set off of any debt or demand, claimed or recoverable by the defendant from the plaintiff." These words point, not to the admission of the debt, but to the admission of the set off. But the Legislature here, I think, contemplated a similar construction of section 18, for, if you read into that section the provisions of section 111 of the Civil Procedure Code passed in the same year, you get very near to the words of the County Court Act.

I would dismiss this suit with costs including the costs of this reference.

PETHERAM, C.J.—In my opinion the answer to the question submitted for the opinion of this Court should be in the affirmative, but before stating the reason for my opinion I find it necessary to examine a little in detail the circumstances under which the qustion arises, as disclosed in the case prepared by the Chief Judge.

It appears that on the 22nd of February 1892 a contract for the sale of some goods was made between the plaintiffs and the defendant, but it does not appear, nor is it material, to consider which was the buyer and which the seller. On the 9th of March 1892 they made another contract by which the seller of the goods agreed with the buyer to buy them back from him at a different price, and upon making up the account, after deducting the price

(1) 5 Exch., 858. (2) L. R., 4 Exch. D. at p. 296.
(3) L. R. 25 Q. B. D. at p. 158.

of the goods at the rate mentioned in one contract from the price at the rate mentioned in the other, a balance of Rs. 500 appeared due from the plaintiffs to the defendant.

On the 21st of April 1892, the plaintiffs by a contract of that date agreed to sell certain other goods to the defendant for delivery in May and June. The goods were not delivered: the plaintiffs allege that the difference between the cuntract price of the goods and the market price at the time when the defendant had agreed to deliver them is Rs. 2,148, and they bring this suit to recover the sum of Rs. 1,648, that being the sum Rs. 2,148 after deducting from it the Rs. 500 which is due from them to the defendant on the balance of the old account.

There can be no doubt that the debt due from the plaintiffs to the defendant on the balance of the old account is a debt which the defendant is entitled to set off against a claim of this nature under section 111 of the Civil Procedure Code. The suit is a suit for the recovery of money, and the claim of the defendant against the plaintiffs for the amount which appears to be due to him on the balance of the old account is an ascertained sum of money legally recoverable by him from the plaintiffs, and the next question is whether such a balance, so arrived at, is a set off admitted by both parties within the meaning of explanation I of section 18 of the Presidency Small Cause Court Act. A debt due from the plaintiff to the defendant is made a set off by law (section 111, Civil Procedure Code), so that if a debt exists a set off exists, and from this I think that it must follow that if an admitted debt exists an admitted set off exists, inasmuch as a debt and a set off are in law the same thing. I think that a debt admitted by the parties is one claimed by the creditor and admitted by the debtor, and that is precisely the condition of the defendant here.

The parties to the two contracts of the 22nd February 1892 and the 9th of March 1892 have closed them, and the account has been made upon that basis, which it is admitted shows a balance in favour of the defendant: that sum he now claims, and the plaintiff admits that he is entitled to recover it, so that it is a claim made by the defendant and admitted by the plaintiff, which is, I think, a debt admitted by both parties in the strictest sense

1893

RAMDEO v. POKHIRAM.

of the word, and if I am right in thinking that the expression "set off" is for the purposes of these sections the equivalent of the word "debt," it must follow that there is a "set off" of Rs. 500 admitted by the parties, and that the Small Cause Court has jurisdiction to entertain the suit.

The wording of the English County Courts Act is slightly different, and consequently the English cases are not direct authorities on the point, but I should add that I cannot reconcile the decision of Huddleston, B., and Grantham, J., in *Hubbard* v. *Goodley* (1), with that of Mathew and Cave, JJ., in *Percival* v. *Pedley* (2), so that there cannot be said to be any current of English decisions in either direction.

The answer of this Court to the question stated is in the negative.

Attorneys for the plaintiffs: *Messrs. Pittar* and *Chick*.

Attorneys for the defendant: *Messrs. Leslie* and *Sons*.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

1893 *Aug.* 22.

RADHA MADHUB SANTRA AND OTHERS (DEFENDANTS) *v.* LUKHI NARAIN ROY CHOWDHRY (PLAINTIFF).*

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), *s.* 373—*Withdrawal of suit without permission to bring fresh suit—Application of the Civil Procedure Code to suits in Revenue Courts.*

Section 373 of the Civil Procedure Code (Act XIV of 1882) does not apply to suits before the Revenue authorities under Act X of 1859, that Act being a complete Code in itself.

THE facts of this case were shortly as follows:—

The plaintiff brought a suit for arrears of rent in the Deputy Collector's Court under Act X of 1859 for the years 1295, 1296 to

* Appeal from Appellate Decree No. 494 of 1892, against the decree of B. L. Gupta, Esq., Judge of Cuttack, dated the 6th January 1892, reversing the decree of Babu Brojo Mohun Roy, Deputy Collector of Cuttack, dated the 15th of September 1891.

(1) L. R. 25 Q. B. D. 156. (2) L. R. 18 Q. B. D. 636.

8 Pous *kist* of 1297. After the case was partially heard the plaintiff withdrew his suit without obtaining permission to bring a fresh suit. Subsequently, the plaintiff instituted a similar suit against the same parties in respect of the same rent. The defendants contended that the matter was *res judicata*, and that the suit would not lie. The Deputy Collector considering that section 373 of the Civil Procedure Code was applicable to rent-suits on the authority of *Madho Prakash Singh* v. *Murli Manohar* (1) held that the plaintiff's claim was barred, and dismissed his suit. On appeal the District Judge of Cuttack reversed the Deputy Collector's finding on the authority of the cases *Modhoo Soodun Mullick* v. *Panch Cowrie Mullick* (2) and *Beer Chunder Joolraj* v. *Tarinee Churn Roy* (3).

From this decision the defendants appealed to the High Court.

Babu *Karuna Sindhu Mukerjee* for the appellants.

Babu *Upendro Nath Mitter* and Babu *Satish Chunder Ghose* for the respondent.

Babu *Karuna Sindhu Mukerjee* :—The provisions of section 373 of the Civil Procedure Code are applicable to rent suits under Act X of 1859. Section 4 of the Civil Procedure Code enumerates the Acts which are not affected by the Civil Procedure Code, and Act X of 1859 is not in list. It was held in the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (4), that Revenue Courts are Civil Courts within the meaning of the Civil Procedure Code, and in *Madho Prakash Singh* v. *Murli Manohar* (1), the Allahabad High Court held that, when the Rent Acts of the North-Western Provinces were silent as regards procedure, the procedure of the Civil Procedure Code should be followed. There is no analogous section in Act X of 1859 to correspond with section 373 of the Civil Procedure Code, and, therefore, under that ruling, section 373 bars this second suit. If that decision is correct as regards the Rent Acts of the North-Western Provinces, it is correct, and has been followed, in respect of the Rent Acts in Bengal. In the case of *Adhirani Narain Kumari* v. *Raghu Mohapatro* (5), the Calcutta High Court approved of the case of *Madho Prakash Singh*

(1) I. L. R., 5 All., 406.
(2) 7 W. R., 302.
(3) 11 W. R., 46.
(4) I. L. R., 9 Calc., 295 : L. R., 9 I. A., 174.
(5) I. L. R., 12 Calc., 50.

1893

RADHA MADHUB SANTRA v. LUKHI NARAIN ROY CHOWDHRY.

v. *Murli Manohar* (1): the only question before them was, did section 43 of the Civil Procedure Code apply to rent suits under Act X of 1859? and they decided in the affirmative. The reason that section 43 was applicable was because there was no similar provision in Act X of 1859. If section 43 is applicable to suits under Act X of 1859, so should section 373 be made applicable, and this claim should be held to be *res judicata*.

The respondents were not called upon.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.), was delivered by

AMEER ALI, J.—This is an appeal from the decision of the District Judge of Cuttack, dated the 6th of January 1892, reversing the decision of the Deputy Collector.

The narrow point for decision in this case is whether section 373 of the Code of Criminal Procedure applies to suits before the Revenue authorities under Act X of 1859.

We think the point has been virtually decided by the reasoning in the Full Bench decision in *Nagendro Nath Mullick* v. *Mathura Mahun Parhi* (2), in which it was held that Act X of 1859, where it is still in force, is a complete Code in itself.

We, therefore, think that the decision of the lower Appellate Court is correct, and that this appeal should be dismissed with costs.

C. S. *Appeal dismissed.*

Before Mr. Justice Norris and Mr. Justice Banerjee.

1893 *August* 24

DAKHYANI DEBEA (DEFENDANT) *v.* DOLEGOBIND CHOWDHRY (PLAINTIFF).*

Small Cause Court, Jurisdiction of—Suit to establish right to crops on basis of title to land on which they are grown—Question of title—Decision as to genuineness of deed—Competent Court.

A suit to establish the plaintiff's right to a standing crop on the basis of his title to the land is an ordinary civil suit, and not a suit of a Small Cause Court nature.

* Appeal from Appellate Decree, No. 857 of 1892, against the decree of Babu Anando Kumar Shurbadhicarry, Subordinate Judge of Manbhum, dated the 29th of February 1892, affirming the decree of A. C. Mittra, Esq., Munsiff of Purulia, dated the 17th of September 1889.

(1) I. L. R., 5 All., 406. (2) I. L. R., 18 Calc., 368.

Godha v. *Naik Ram* (1) and *Shiboo Narain Singh* v. *Mudden Ally* (2) relied on.

Held that if in such a suit the plaintiff's title depended upon the genuineness of a *kobala* in respect of the land, a finding with regard to such genuineness is binding as *res judicata* in a subsequent suit between the same parties with regard to the title to the same land, although no issue was distinctly raised in the former suit on the question of genuineness.

Soorjomonee Dayee v. Suddanand Mohapatter (3) referred to.

ONE Kedar Nath Patock was the owner of an 8-anna share in a certain *mouza* and transferred certain land within the said *mouza* to his sister (the defendant in the present case) by a *kobala* dated in 1876. Kedar Nath's 8-anna share in the *mouza* was in 1883 sold at public auction in satisfaction of a money decree against him, and the plaintiff's father purchased it, and the purchased share came into the possession of the plaintiff and his co-sharers on the death of the plaintiff's father. In order to realize certain money due on a decree from Kedar Nath the plaintiff and his co-sharers caused some crops then standing on the disputed land to be attached in execution. In these execution proceedings the defendant relying on her *kobala* put in a claim to the crops, but the claim was rejected. The defendant then instituted a suit against the plaintiff to establish her right to the crops on the ground that the disputed land belonged to her. This suit was brought on the basis of the genuineness of her *kobala*, but the suit was dismissed, and an appeal from that decision was also dismissed. The plaintiff then granted a *jamai* right and settled the land with one Dokori Gorai, who grew paddy on the land. The defendant had the paddy forcibly reaped by her servants. Dokori Gorai then instituted criminal proceedings against the aggressors, but the Criminal Court dismissed the case, and thus virtually dispossessed the plaintiff, who then filed the present suit against the defendant to recover possession of the said land.

The Munsif, following the finding of the Appellate Court in the former suit, held that the *kobala* was a collusive one, and gave the plaintiff a decree.

(1) I. L. R., 7 All., 152.
(2) I. L. R., 7 Calc., 608.
(3) 12 B. L. R., 304; L. R. I. A. Sup. Vol. 212.

1893

DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY.

The defendant then appealed, and the Subordinate Judge dismissed the appeal on the ground that the finding in the former suit acted as *res judicata* and that it was not open to the defendant to again raise the same contention as to the *bonâ fides* of her *kobala*. From this decision the defendant appealed to the High Court.

Babu *Bhobani Churn Datt* for the appellant.

Babu *Golap Chunder Sarkar* for the respondent.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—The only question raised in this appeal is, whether a decision in a former suit between the same parties should operate as *res judicata* upon the issue whether the *kobala* set up by the defendant as the basis of her title is a *bonâ fide* document.

The Courts below have held that it operates as *res judicata*; and the defendant appeals, contending that the Courts below are wrong.

We are of opinion that this contention is not correct. It was argued for the defendant-appellant that the decision in the former suit could not operate as *res judicata* for two reasons, *first*, because the former suit was one of the Small Cause Court class, and the decision therefore must be taken to be one by a Court not of jurisdiction competent to decide the present suit; and, *secondly*, because the question of the *bonâ fides* of the *kobala* was not a matter directly and substantially in issue in the former suit, but arose, if at all, only incidentally.

The former suit was brought by the present defendant for a declaration of her title to a standing paddy crop which had been attached in execution of a decree, and had been unsuccessfully claimed by the present defendant in the execution proceeding. The present defendant, the plaintiff in that suit, sought to establish her right to the paddy crop, setting out, as the basis of her title to the crop, her title to the land under the *kobala* now in dispute: she was still in possession of the crop, and had no reason to sue for the recovery of the crop or its value, nor did she sue for the same. That being the nature of her suit, it could not, under section 6 of Act XI of 1865, the Small Cause Court Act then in force, have been brought in the Court of Small

1893

DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY.

Causes. The suit was an ordinary civil suit, and the Court which tried that suit was an ordinary Civil Court. In support of the view we take, we may refer to two cases, *Shiboo Narain Singh* v. *Mudden Ally* (1) and *Godha* v. *Naik Ram* (2). The first branch of the appellant's contention must therefore fail.

Then as to the second branch of the argument, it is true that no issue upon the question of the *bonâ fides* of the *kobala* was raised, in so many words, in the former suit; but seeing that in that suit the plaintiff, that is the present defendant, based her claim solely upon the *kobala*, and seeing that the only ground upon which the Court found against her was that the *kobala* was not a *bonâ fide* document, we must hold that the question of the *bonâ fides* of the *kobala* was directly and substantially in issue in the former suit. The decision of the Privy Council in the case of *Soorjomonee Dayee* v. *Suddanand Mohapatter* (3) fully supports this view.

The result then is, that this second appeal must be dismissed, and the decree appealed against affirmed with costs.

Appeal dismissed.

Before Mr. Justice Norris and Mr. Justice Banerjee.

1893 *August* 25.

MOHESH CHUNDER GHOSE AND OTHERS (DEFENDANTS NOS. 1 TO 5) *v.* SARODA PRASAD SINGH (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Landlord and Tenant—Transfer of tenure—Bengal Tenancy Act (VIII of 1885), ss. 17, 18, and 88—Rights of Purchaser or transferee of tenure—Right of Suit.

There is nothing in s. 88 of the Bengal Tenancy Act to prevent a person who has purchased a share in a *mokurrari* holding from bringing a suit for a declaration of his right to that share and for possession of the same after setting aside a sale held in execution of a decree for rent to which he

* Appeal from Appellate Decree, No. 956 of 1892, against the decree of Baboo Rabi Chandra Gangooly, Subordinate Judge of Midnapore, dated 24th March 1892, affirming the decree of Baboo Jogendranath Mukerjee, Munsif of Gurbetta, dated the 31st of March 1891.

(1) I. L. R., 7 Calc., 608.
(2) I. L. R., 7 All., 152.
(3) 12 B. L. R., 304; 20 W. R., 377.

1893

MOHESH CHUNDER GHOSE v. SARODA PRASAD SINGH.

was not made a party. Sections 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding, and enable the transferee to be regarded as one of the tenants in respect of the holding.

THE facts in this case were as follows:—

The defendants Nos. 1 to 6 were the *putni talukdars* of 91 bighas 6 cottahs odd of certain lands, the names of defendants Nos. 1 to 5 being alone registered in respect of the lands, and the defendants 7 to 18 were the *mokurrari* holders from defendants 1 to 6 of a two-thirds share of the said holding. The defendants 7 to 18 sold their two-third share to the plaintiff under a *kobala* dated the 19th Bysack 1295 (30th April 1888). The plaintiff gave notice of his purchase and paid the landlord's fees to the defendant No. 1, who received them and gave a receipt on behalf of the defendants Nos. 1 to 6. The defendants Nos. 1 to 6 had been anxious to purchase this two-thirds share which the plaintiff bought, but not being able to do so, the defendant No. 6 instituted a suit on a mortgage bond relating to the land in question against the plaintiff and the defendants Nos. 7 to 18. The plaintiff satisfied that demand by getting the other defendants to deposit the amount claimed. After that the defendants Nos. 1 to 5 instituted a suit against the defendants Nos. 7 to 18 alone for rent that accrued before the plaintiff's purchase, and, though aware of the plaintiff's purchase, ignoring his tenancy. The defendants Nos. 7 to 18 in their written statement alleged that they had sold their share to the plaintiff: the Court without making the plaintiff a party gave a decree against the defendants Nos. 7 to 18. The paddy on the plaintiff's lands was then attached in execution of that decree, and the plaintiff deposited through the said defendants the sum of Rs. 202-8, being the amount claimed, and had the execution case struck off. After this another suit was brought for subsequent rent by the defendants Nos. 1 to 5 against defendants Nos. 7 to 18 in respect of rent due upon the whole tenure. The plaintiff applied to be made a party in that case: his application was not acceded to, and another decree was made against defendants Nos. 7 to 18. The decree was collusively executed, no writ of attachment or sale proclamation was issued, and on the 16th August 1889 the property was put up to auction and purchased by defendants Nos. 1 to 6 for the sum of

Rs. 105, the value really being Rs. 900. The plaintiff on hearing of the sale deposited the money and applied to have the sale set aside, but his application was refused. The plaintiff was thus dispossessed of the share purchased by him, and on the 15th August 1890 he filed a suit in the Munsif's Court against the defendants Nos. 1 to 18 for a declaration of his right to the two-thirds share purchased by him and for possession, and asked to have the sale (held in execution for the decree for rent to which he was not a party) set aside.

The Munsif gave the plaintiff a decree and declared that the execution sale was not binding against him and ordered it to be set aside, and this decree was confirmed by the Subordinate Judge on appeal.

The defendants Nos. 1 to 5 appealed to the High Court, the other defendants, as well as the plaintiff, being made respondents.

Dr. *Rashbehary Ghose* and Baboo *Bepin Behary Ghose* for the appellants.

Baboo *Saroda Churn Mitter* for the respondents.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was as follows:—

BANERJEE, J.—This was a suit brought by the plaintiff-respondent for declaration of his right to a 10 annas, 15 gundas, 1 cowri, 1 krant, (that is a two-thirds) share in a *mokurrari* holding, and for possession of the same, after setting aside a sale held in execution of a decree for rent, to which he was no party.

The defence was that the plaintiff was not entitled to maintain the suit; and that the holding in question had been purchased by the defendants Nos. 1 to 5 at a valid sale held in execution of a decree for rent obtained by them against their registered tenant.

The Courts below have found for the plaintiff, and given him a decree declaring that the execution sale is not binding as against him, and ordering that the entire sale be set aside.

On second appeal it is contended on behalf of the defendants Nos. 1 to 5 that the decision of the Lower Appellate Court is wrong in law, being opposed to the provisions of section 88 of the Bengal Tenancy Act, which provides that the "division of a tenure, or holding, or distribution of the rent payable in respect

1893

MOHESH CHUNDER GHOSE v. SARODA PRASAD SINGH.

thereof, shall not be binding on the landlord unless it is made with his consent in writing." But what the plaintiff here asks for is not that he should be declared to have purchased a two-thirds share of the holding in question, and thereby to have become entitled to a separate holding consisting of that two-thirds share, and liable only for a proportionate share of the entire rent, but that he is entitled to be regarded as one of the persons who own and possess the holding in question, the liability for the rent of the entire holding still continuing joint.

We think that the plaintiff's contention, that he is entitled to be regarded as one of the tenants under the defendants Nos. 1 to 5 in respect of the holding of which he has purchased a share, is fully borne out by section 17 of the Bengal Tenancy Act read with section 18, and is not opposed to section 88. Sections 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding and entitle the transferee to claim to be regarded as one of the tenants in respect of the holding. If that is so, the decree in the rent suit that was brought only against the former tenant, after he had transferred a share of the holding to the present plaintiff, cannot be regarded as a valid and binding decree against the plaintiff; and the sale held in execution of such a decree cannot affect the rights of the plaintiff. The decree, therefore, that the Courts below have given, declaring that the plaintiff's share in the holding in question is not affected by the execution sale at which the defendants Nos. 1 to 5 have purchased, and giving him joint possession of the said share in the entire holding, must stand.

It was then contended that the decree appealed against goes a great deal further, and directs that the entire execution sale should be set aside. To that extent, we think it cannot be sustained; and the learned vakil who appears for the respondent does not contend that the decree ought to be supported to that extent. That being so, so much of the decree as directs that the entire execution sale be set aside cannot stand.

The decree passed by the Courts below will, therefore, be modified by striking out this last mentioned part. Subject to this modification, the decree of the Court below is affirmed, and the appeal dismissed with costs.

C. S. *Decree varied.*

Before Mr. Justice Pigot, Mr. Justice Macpherson, and Mr. Justice Banerjee.

AZIZAN (PLAINTIFF) *v.* MATUK LAL SAHU (DEFENDANT).*

1893 *Nov.* 28.

Civil Procedure Code (Act XIV of 1882), *s.* 244—*Separate suit—Uncertified adjustment—Agreement not to execute decree—Suit by judgment-debtor to stay execution—Civil Procedure Code (Act XIV of* 1882), *s.* 258.

The defendant in January 1887 obtained a decree against the plaintiff which he partially executed, and thereupon an adjustment of account took place between the plaintiff and defendant in which a certain sum was found due by the plaintiff to the defendant, for which sum the plaintiff gave a bond to the defendant in consideration of which the defendant agreed to exonerate the plaintiff from liability for the balance due under the decree. This satisfaction of the decree was not certified to the Court. On 12th March 1890 the defendant applied for further execution of the decree. In a suit for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it, it was contended that the suit was barred by section 244 of the Civil Procedure Code.

Held by PIGOT and MACPHERSON, JJ., (BANERJEE, J., dissenting) that section 244 is not limited by section 258, and that the suit was not maintainable. Where a decree is satisfied by an agreement out of Court and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement.

Per PIGOT, J.—Section 244 of the Civil Procedure Code does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing the decree.

Per BANERJEE, J.—A suit on the agreement was maintainable. Section 258 of the Civil Procedure Code having enacted that an uncertified adjustment cannot be recognized as an adjustment of the decree by any Court executing the decree, implies that it may be recognized as such by a Court trying the matter as a regular suit.

THE facts of this case were as follows:—

The defendant obtained a decree against the plaintiff and her co-sharers, dated the 31st of January 1887, for Rs. 8,578-15-9 in a

* Appeal from Appellate Decree, No. 2166 of 1892, against the decree of W. H Page, Esq., District Judge of Tirhoot, dated the 25th of November 1892, affirming the decree of Babu Brojo Mohun Pershad, Officiating Subordinate Judge of that district, dated the 14th of Jauuary 1892.

1893

AZIZAN
v.
MATUK LAL
SAHU.

suit on a bond of the 4th October 1879 executed by Sheikh Mohomed Saleh, whose heirs the plaintiff and her co-sharers were. The plaintiff and her co-sharers had one of the properties which they inherited from Sheik Saleh sold for arrears of Government revenue. The plaintiff's share in that sale amounted to Rs. 640-1-0, and the whole sale realized Rs. 6,584-1-0. The defendant in execution of his decree of the 31st of January 1887 caused the whole amount, being the share of the plaintiff and her co-sharers, to be attached, and with the consent of the plaintiff took the money out on the 14th of July 1887 in part satisfaction of his decree. The defendant then demanded a further sum of Rs. 633-1-4 from the plaintiff, on the ground that it was the balance due to him from Sheikh Saleh. Accounts were then adjusted between plaintiff and defendant, and the sum of Rs. 750 was found to be due from the plaintiff to the defendant, for which sum she on the 26th August 1887 executed a mortgage bond in favour of the defendant in satisfaction of all claims including her liability under the decree, the defendant promising to certify to the Court the satisfaction of the decree, so far as the plaintiff was concerned, and the plaintiff relying on him to certify the payment to the Court. This, however, he did not do, but on the 12th of March 1890 he applied for execution of his decree against the plaintiff and the other judgment-debtors. In reply to the notice of execution the plaintiff objected and stated that the decree had already been satisfied as against her. Her objection was held not to have been filed in time, and was dismissed under section 258 of the Civil Procedure Code. The plaintiff then instituted the present suit for a declaration that the defendant had no right to execute the decree as against her, and for an injunction to restrain him from so executing it.

The Subordinate Judge dismissed the suit on the merits, holding that the agreement set up by the plaintiff had not been established, but that the suit was not barred by section 244 of the Civil Procedure Code.

On appeal the District Judge held that the suit was barred by section 244 of the Civil Procedure Code, but expressed no opinion on the merits.

From this decision the plaintiff appealed to the High Court.

Babu *Umakali Mukerjee* (for Mr. *C. Gregory*) for the appellant.

Mr. *Hill*, Dr. *Troyluckhonath Mitter*, and Babu *Aubinash Chunder Banerjee* for the respondent.

Babu *Umakali Mukerjee*:—The provisions of section 244 of the Civil Procedure Code do not bar the present suit. Under section 258 a Court executing a decree is precluded from recognizing an uncertified payment, and therefore section 244 is limited in its operation by section 258, and does not apply to any case in which there is an alleged payment or adjustment which has not been certified in accordance with the provisions of that section. The decisions of this Court show that a suit of the nature of the present suit is maintainable, and that the provisions of section 244 are limited by section 258. In a case under the corresponding sections of the old Acts, section 206, Act VIII of 1859, and section 11 of Act XXIII of 1861, the case of *Gunamani Dasi* v. *Pran Kishori Dasi* (1), Couch, C.J., said "that section 11 of Act XXIII of 1861 and section 206 of Act VIII of 1859 (which to some extent corresponded to sections 257 and 258 of the present Code) could only be reconciled by holding that section 11 does not apply to payments made out of Court and not certified to the Court and of which it cannot take notice." The judgment-debtor in that suit brought an action against the decree-holder for damages to recover the money which the decree-holder had obtained in contravention of his agreement. Then again in *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (2) this Court held that where a decree-holder agrees for good consideration not to enforce his decree, the Court may legitimately on the suit of the proper party issue an injunction against the former to prevent him from doing what he has promised not to do, notwithstanding the provisions of section 206 of Act VIII of 1859; and in *Nujeeni Mullick* v. *Erfan Mollah* (3) the Court held "that a suit to enforce a contract by which a dispute was adjusted between a decree-holder and judgment-debtor was not barred by section 206 of Act VIII of 1859." Section 206 of that Act corresponds to sections 257, 258 of the present Code, and it was held that in each of those cases section 206 did not prohibit the suit. The decision of the Full Bench

(1) 5 B. L. R., 223; 13 W. R. F. B., 69.
(2) 22 W. R., 194. (3) 22 W. R., 298.

1893

AZIZAN v. MATUK LAL SAHU.

was followed later by this Court in the case of *Guni Khan* v. *Kunjo Behary Sein* (1), where it was held that sections 244 and 258 of Act X of 1877 had made no change in the law in that respect. Then there was the case of *Poromanand Khasnabish* v. *Khepoo Paramanick* (2) so late as 1884 which followed the Full Bench decision. The Full Bench decision has been followed in another class of cases, where sales in execution of decrees have been set aside on the ground that the decree had in fact been satisfied by an uncertified payment out of Court—*Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (3), *Pat Dasi* v. *Sharup Chand Mala* (4). Then there are analogous cases in the Bombay Court—*Swamirao Narayan Deshpande* v. *Kashinath Krishna Mutalik Desai* (5) and *Mukund Harshet* v. *Haridas Khemji* (6)—holding that a decree-holder who has had the decree satisfied, though the payment is not certified, is not entitled to take advantage of his own wrong and execute again: if he does a suit for injunction or damages will lie.

Mr. *Hill* for the respondent:—It has been argued that the terms of section 244 do not bar this suit. By considering the different enactments on which section 244 has been framed, it will be seen what the tendency of the Legislature has been. The original section was section 206 of Act VIII of 1859, which ran thus: "All monies payable under a decree shall be paid into Court unless such Court or the Court which passed the decree shall otherwise direct. No adjustment of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made or to whom it has been transferred." The Legislature, in order to give Courts the fullest powers in execution proceedings, enacted by an Act amending the Civil Procedure Code, namely Act XXIII of 1861, section 11, "that questions regarding mesne profits and interest and sums paid in satisfaction of a decree and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree shall be determined by

(1) 3 C. L. R., 414.
(2) I. L. R., 10 Calc., 354.
(3) I. L. R., 9 Calc., 788.
(4) I. L. R., 14 Calc., 376.
(5) I. L. R., 15 Bom., 419.
(6) I. L. R., 17 Bom., 23.

the order of the Court executing the decree." By Act X of 1877, section 244, it was enacted that "The following questions shall be determined by order of the Court executing the decree, and not by a separate suit," namely (clause *c*), "any other questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution of the decree." By Act XII of 1879 the words "discharge or satisfaction" were inserted after the word "execution" in section 244, clause (*c*) of Act X of 1877. The Civil Procedure Code, Act XIV of 1882, section 244, clause (*c*), contained these changes, and by section 26 of Act VII of 1888 another addition was made, and it now reads thus:—"any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof."

Now as regards section 258. The original section was section 206 of Act VIII of 1859. Section 258 of Act X of 1877 corresponded with section 206 of Act VIII of 1859. By section 36 of Act XII of 1879 a new section was inserted in the place, and instead of section 258 of Act X of 1877, the chief alteration being in the words "no such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid;" and by section 27 of Act VII of 1888, the last paragraph of section 258 of Act X of 1877, as it then stood, was altered to the following:—"Unless such payment or adjustment has been certified as aforesaid it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree" This is how the new sections now run, and it will be seen that the sections have been so enlarged that a Court may deal with all questions concerning a decree passed by it.

The question raised in the appeal is a question concerning the execution of a decree, and the decree has not been fully executed as yet in a regular way, and therefore a suit to stay the execution is barred by the terms of section 244. The cases cited by the other side in which suits have been allowed have been cases of suits to recover damages after the execution proceedings have absolutely closed and when the judgment-debtor has satisfied the decree twice. But in this case the appellant has not been yet

1893

AZIZAN v. MATUK LAL SAHU.

compelled to satisfy the decree, though she never certified the amount which she alleges she paid. The execution proceedings are still open, and under the authorities she cannot maintain her present suit.

By section 258 as now framed, and as it has been framed since 1877, the judgment-debtor can compel the decree-holder to certify, but he must take the necessary measures for that purpose within the prescribed period. If he does not see the payment certified, then the effect of section 244 read with section 258 is that the payment or adjustment does not satisfy the decree, and the judgment-debtor is precluded from bringing a separate suit to prevent execution. Section 258 does not limit the operation of section 244. There is an express finding to that effect in *Bairagulu* v. *Bapanna* (1). In *Swamirao Narayan Deshpande* v. *Kashinath Krishna Matalik Desai* (2), Sargent, C.J., says:—"Since the amendment made in the above section (section 258) by section 27 of Act VII of 1888, such payment or adjustment may be recognized by a Civil Court, *except when executing the decree*, and the Court is here executing the decree. In *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3), there was an alleged private payment by some of the judgment-debtors of their share of the decree and an alleged agreement by the decree-holder not to execute the decree as against them. In spite of the agreement the decree-holder did execute the decree, and had the property sold, and it was purchased by a third party. In a suit by the judgment-debtor against the decree-holder and the purchaser to set aside the sale, their Lordships in the Privy Council held that section 244 was a bar to such a suit. This decision overrules *Sakharam Ramchandra Dikshit* v. *Govind Vaman Dikshit* (4) and *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (5). Section 258 clearly prohibits a Court executing a decree from recognizing an uncertified adjustment. The Legislature has by the Acts of 1877, 1879, 1882, and VII of 1888, followed the policy of restricting to the Court of execution the determinations of all questions relating to the execution of the decree and arising between the parties to it.

(1) I. L. R., 15 Mad., 302.
(2) I. L. R., 15 Bom., 419 (421).
(3) I. L. R., 19 Calc., 683; L. R. 19 I. A., 166.
(4) 10 Bom., H.C., 361.
(5) I. L. R., 9 Calc., 788.

Section 27 of Act VII of 1888 was drawn by the Legislature after the case of *Abdul Rahiman* v. *Khoja Khaki Aruth* (1) had been decided, in which all the authorities were examined. The Legislature has framed section 244 so as to prohibit in a separate suit between the parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing the decree.

Babu *Umakali Mukerjee* replied.

The following judgments were delivered by the Court (MACPHERSON and BANERJEE, JJ.):—

MACPHERSON, J.—The plaintiff is one of the heirs of Mahomed Saloh, against whom and others the defendant obtained a decree for money in January 1877. The decree was executed in that year, and partial satisfaction was obtained. In March 1890 the defendant again applied to execute the decree for the whole outstanding balance against the plaintiff and other judgment-debtors or their representatives; the plaintiff objected to the execution, on the ground that the decree had been adjusted in so far as she was concerned, but her objection was disallowed, as the adjustment had not been certified to the Court. The plaintiff brings this suit for a declaration that the defendant has no right to execute the decree as against her and for an injunction to restrain him from so executing it. She says that in August 1887 they adjusted their accounts; that her share of the amount which had been realized in satisfaction of the decree and her share of the amount which was still outstanding were apportioned, and that she gave the defendant a bond for Rs. 750, which included her share of the outstanding balance of the judgment-debt and the amount due by her on other accounts in satisfaction of all claims, and that the defendant agreed to exonerate her from all further liability under the decree and to certify the adjustment to the Court, but that he did not certify it and is now executing his decree.

The question is whether the suit is not prohibited by section 244 of the Procedure Code. Beyond doubt it raises questions relating to the execution, discharge or satisfaction of the decree as between

(1) I. L. R., 11 Bom., 6.

1893

AZIZAN v. MATUK LAL SAHU.

the parties, or the representatives of the parties, to the suit in which the decree was passed, and if it is maintainable, the Court must, on a determination of those questions, decide whether the decree can or cannot be executed. It seems to me immaterial whether the plaintiff relies on the alleged adjustment or on the alleged agreement of the decree-holder not to execute the decree, as the consideration for the agreement was the adjustment by the bond, and this she would have to prove for the purpose of preventing the execution. It is argued that section 244 does not apply to this case, because the Court executing the decree, being precluded by section 258 from recognizing an uncertified payment, could not give the plaintiff the relief asked for, or, in other words, that section 244 is limited in its operation by section 258, and does not apply to any case in which there is an alleged payment or adjustment which has not been certified in accordance with the provisions of that section. Such a construction would require the insertion of words which are not to be found in the section, and for introducing which I see no warrant. The object of the section clearly is that the Court executing the decree, having the parties before it, should determine all questions relating to the execution, including the question whether the execution should or not proceed, and its order has the force of a decree. I cannot suppose that the Legislature with that object in view contemplated or sanctioned the institution by the judgment-debtor of a separate suit which might delay the execution for an indefinite period. By section 258 as now framed and as it has been framed since 1877, the judgment-debtor can compel the decree-holder to certify, but he must take the measures necessary for that purpose within the prescribed period. If he fails to do so, the effect of section 244 read with section 258 seems to be that the payment or adjustment does not operate to satisfy the decree, and that the judgment-debtor cannot by a separate suit prevent execution on the ground that the decree has been satisfied or adjusted. He may be able in a suit differently framed to get relief of another kind, but it is not necessary to consider this.

There is another difficulty in the appellant's way. The decree was under execution and the Court executing it overruled, no matter on what grounds, her objection to the execution. The effect of

the order was that execution should proceed, and the order has the force of a decree which is still in force. I fail to see how another suit will lie to prevent the decree-holder from executing his decree.

I concur in the decision of the Madras Court in *Bairagulu* v. *Bapanna* (1), which is directly in point, that section 258 does not limit the operation of section 244 of the Procedure Code.

It is said, however, that the decisions of this Court are the other way, and show that such a suit as this can be maintained. It is necessary therefore to refer to those cases, although I think they have not the effect attributed to them.

Stress is placed upon the remarks of Couch, C.J., in *Gunamani Dasi* v. *Pran Kishori Dasi* (2) decided by a Full Bench of this Court. That was a suit by the judgment-debtor to recover from the decree-holder money paid out of Court in satisfaction of a decree and the payment of which was not certified, and it was held that section 11 of Act XXIII of 1861, which was the section corresponding to section 244 in the present Code, did not prohibit such a suit, which in no way affected the execution of the decree. Couch, C.J., said that section 11 of Act XXIII of 1861 and section 206 of Act VIII of 1859 (which to some extent corresponded to sections 257, 258 of the present Code) could only be reconciled by "holding that section 11 does not apply to payments made out of Court and not certified to the Court and of which it cannot take notice." Those remarks must be taken in connection with the provisions of the sections referred to and the nature of the suit then brought. It was particularly pointed out that it was a suit to recover the money originally paid under the compromise, and of which the defendant must be regarded as a trustee for the plaintiff, and not a suit to recover back the money levied in execution of the decree.

Then there are two cases in 22 Weekly Reporter upon which great reliance has been placed, and they are the only instances of cases, so far as I know, brought to restrain a decree-holder from executing the decree. In neither are the facts fully stated. In

(1) I. L. R., 15 Mad., 302.
(2) 5 B L. R., 223; 13 W. R. F. B., 69.

1893

AZIZAN v. MATUK LAL SAHU.

Nubo Kishen Mookerjee v. *Debnath Roy Chowdhry* (1) it is said that the defendant agreed for a consideration of Rs. 2,500 not to enforce his decree against the plaintiff, but he was to be at liberty to continue his suit against the other parties and to establish his right against them," and that the object of the suit was to obtain an injunction against the defendant personally to prevent him from breaking his agreement by applying to the Court to execute the decree against the plaintiff. In *Nujeeni Mullick* v. *Erfan Mollah* (2) the suit was based on a contract adjusting a dispute between the defendant decree-holder and the plaintiff judgment-debtor to the effect that the defendant on receiving Rs. 100 from the plaintiff should execute a conveyance and should not execute two decrees which he held against the plaintiff. It was held in each of the cases that section 206 of Act VIII of 1859 did not prohibit the suit, but in neither is there any allusion to section 11, Act XXIII of 1861, the material portion of which was as follows: "questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal."

These cases cannot be regarded as an authority for holding that section 244 of the present Code does not apply to the present case. Section 244 is more explicit, and enacts in clause (*c*) that, among the questions to be determined by order of the Court executing a decree and not by separate suit are, "any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, *or to the stay of execution thereof*." It does not appear, moreover, that in those cases there had been any application for execution or any order of the execution Court. In *Guni Khan* v. *Kunjo Behary Sein* (3) and *Poromanand Khasnabish* v. *Khepoo Paramanick* (4), the Court merely followed the Full Bench decision in *Gunamani Dasi* v.

(1) 22 W. R., 194.
(2) 22 W. R. 298.
(3) 3 C. L. R., 414.
(4) I. L. R., 10 Calc., 354.

Pran Kishori Dasi above referred to. In both those cases the decree had been satisfied by an uncertified payment, notwithstanding which the decree-holder took out execution. The judgment-debtors sued for compensation in the form of damages, and it was not attempted to interfere with the execution of the decree.

Then there is another class of suits to set aside a sale held in execution of a decree on the ground that the decree had been in fact satisfied by an uncertified payment out of Court. Of this, *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (1) and *Pat Dasi* v. *Sharup Chand Mala* (2) were instances. It may be conceded that if a sale which had taken place could be set aside on such a ground, in a separate suit, a separate suit could be maintained to prevent the sale taking place. The first-mentioned case is, I think, really no authority in favour of a separate suit for such a purpose. The Court, it is true, confirmed the decree setting aside the sale, but in doing so it professedly followed the decision of the Full Bench in the case already referred to and the decision in *Guni Khan* v. *Kunjo Behary Sein*, although the relief asked for and given was of a wholly different character, and the execution of the decree in the latter two cases was left untouched. Although, however, the sale was set aside, the decree-holder was the purchaser at the execution sale, and it did not in substance matter whether the sale was set aside or whether he was directed to reconvey the property, and no objection to the decree appears to have been taken on that ground.

The case of *Pat Dasi* v. *Sharup Chand Mala* was different. There the plaintiff's property had been sold in execution of a decree for money and purchased by a person who was no party to the decree in which the suit was passed. The judgment-debtor then brought a suit against the decree-holder and the purchaser to set aside the sale, on the ground that the decree had been privately satisfied and that the subsequent proceedings in execution were fraudulent. A division Bench of this Court, after holding that the private payment could be proved otherwise than by a certificate under section 258, set aside the sale on the ground that the decree having been satisfied was inoperative, and that the sale was void and of no effect. I should hesitate to follow

(1) I. L. R., 9 Calc., 788. (2) I. L. R., 14 Calc., 376.

1893

AZIZAN v. MATUK LAL SAHU.

that decision to its full extent under any circumstances, but in so far as it is an authority to show that a suit of that nature could be at all maintained, it is, I think, directly opposed to a recent decision of the Judicial Committee, in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1). That was a suit of the same description. There was an alleged private payment by some of the judgment-debtors of their share of the decree and an alleged agreement by the decree-holder not to execute it as against them. Notwithstanding that, he did execute it, and sold their property, which was purchased by a third party. The judgment-debtors then brought a suit against the decree-holder and the purchaser to set aside the sale. It was argued that section 244 did not apply, as the purchaser was not a party to the suit in which the decree was passed, but their Lordships said that made no difference, and that the suit was prohibited by section 244; they added that they were glad to find that the Courts in India had not placed any narrow construction on the provisions of section 244. That case seems to go further in the direction of a strict enforcement of the provisions of section 244 than the decision of the Full Bench of this Court in *Mohendro Narain Chaturaj* v. *Gopal Mondul* (2).

The argument that section 244 does not apply to the present case would, I think, be equally applicable to the case which was before the Privy Council. Neither before sale nor after sale can an uncertified payment be proved in the Court executing the decree. If section 244 does not apply to a suit in which an uncertified payment is set up before the sale, it would not, it seems to me, apply to a suit in which it was set up after the sale. In neither instance could the Court executing the decree give any relief.

Another argument has been founded on the alteration in the last paragraph of section 258. The Codes of 1859 (section 206) and 1877 (section 258) provided that an adjustment of a decree made out of Court should not be recognized by the Court executing the decree unless it had been certified to that Court. By Act XII of 1879, section 258 of Act X of 1877 was altered so that the adjustment should not be recognized by any Court. The provisions remained till 1888, when by Act VII of that year the section

(1) I. L. R., 19 Calc., 683; L. R. 19 I. A., 166.
(2) I. L. R., 17 Calc., 769.

was again altered, so that the adjustment should not be recognized by any Court executing the decree. The alteration effected in 1879 gave rise to some difference of opinion as to the proper construction of the words "any Court" [See *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (1), *Poromanand Khasnabish* v. *Khepoo Paramanick* (2), *Pat Dasi* v. *Sharup Chand Mola* (3), *Abdul Rahiman* v. *Khoja Khaki Aruth* (4)], and the Act of 1888 restored the old provision. The effect of the alteration last made was not, I think, to limit or in any way interfere with the operation of section 244. It admits of an uncertified payment being proved in any other Court, but not for the purpose of preventing or interfering with the execution of the decree.

I think the suit has been rightly dismissed, but as my learned colleague takes a different view, the case must be referred under section 575 of the Code to such one or more Judges of the Court as the Chief Justice may appoint.

BANERJEE, J.—The question that arises for determination in this case is whether the suit is barred by section 244 of the Code of Civil Procedure.

The suit was brought by the plaintiff appellant, on the allegation that the defendant on the 31st of January 1887 obtained a decree for a certain sum of money against the plaintiff and certain other persons; that after having obtained partial satisfaction by execution of that decree he entered into a contract with the plaintiff by which he released the plaintiff from all liability under the decree upon obtaining from the latter a mortgage bond, dated the 26th August 1887, for a certain sum of money which was made up partly of what was settled to be the remainder of the plaintiffs' debt under the decree and partly of a debt due on a certain *bohi khata* or account; that the defendant promised to file in Court a petition exonerating plaintiff from liability under the decree, but in contravention of such promise applied for execution against her and the other judgment-debtors on the 12th March 1890; that the plaintiff thereupon raised objections to the execution proceeding against her, but they were disallowed on the 24th

(1) I. L. R., 9 Calc., 788.
(2) I. L. R., 10 Calc., 354.
(3) I. L. R., 14 Calc., 376.
(4) I. L. R., 11 Bom., 6.

1893

AZIZAN v. MATUK LAL SAHU.

of January 1891 under section 258 of the Code of Civil Procedure; and that the plaintiff was consequently obliged to bring this suit for a declaration that the defendant has no right to execute the decree against the plaintiff and for an injunction restraining him from doing so. The defendant amongst other matters urged that the suit was barred by section 244 of the Code of Civil Procedure; that the bond mentioned by the plaintiff was not taken in satisfaction of the decree; and that there was no agreement to release her from liability under the decree.

The first Court held that the suit was not barred by section 244, but that the agreement set up by the plaintiff was not established, and it accordingly dismissed the suit.

On appeal the Lower Appellate Court, without going into the merits, has affirmed the first Court's decree dismissing the suit on the ground that it is barred by section 244.

In second appeal it is contended for the plaintiff that the suit is not barred by section 244 of the Code of Civil Procedure; and in my opinion this contention is valid.

Section 244 of the Code of Civil Procedure enacts that certain classes of questions arising between the parties to a suit, including, among others, questions relating to the discharge or satisfaction of the decree, shall be determined by order of of the Court executing the decree and not by separate suit. A provision like this evidently implies that the questions for the determination of which a separate suit is prohibited are questions which the Court executing the decree is competent to determine in the course of the execution proceedings, and the object of such a provision obviously is, not to bar inquiry into any question, but to enable the parties to obtain adjudication of questions relating to execution without any unnecessary expense or delay such as a fresh suit might entail. Section 244 of the Code of Civil Procedure cannot, therefore, be taken to have been intended to bar a suit like the present, for the determination of the question whether there was or was not an adjustment of the decree which the decree-holder wrongfully omitted to certify to the Court, after having undertaken to do so, when section 258 of the same Code prohibits the Court executing the decree to recognize such

uncertified adjustment. The same view was taken of the corresponding provisions of the old law (section 11 of Act XXIII of 1861 and section 206 of Act VIII of 1859) by a Full Bench of this Court in the case of *Gunamani Dasi* v. *Pran Kishori Dasi* (1) in which Sir R. Couch in his judgment observed: "There is nothing in section 11 of Act XXIII of 1861 which prevents such a suit as the present from being brought. That section says that all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and *relating to the execution of the decree*, shall be determined by order of the Court executing the decree, and not by a separate suit; but section 206 of Act VIII of 1859 prevents the Court executing the decree from taking any notice of payments not made through the Court or certified to the Court, and I cannot think that it was the intention of the Legislature that the Courts executing the decree should be bound to hear and determine questions as to payments which by section 206 they were forbidden to recognize. I think these two sections can only be reconciled by holding that section 11 does not apply to payments made out of Court and not certified to the Court and of which it cannot take notice."

To hold otherwise, that is, to hold that an uncertified adjustment of a decree cannot be given effect to as an adjustment by a separate suit, would be to hold that it cannot be recognized and given effect to at all. For if it cannot be recognized and given effect to by a separate suit, then seeing that its cognizance by the Court executing the decree is barred by section 258, there is no other mode in which it can be given effect to. This, however, the Legislature did not intend, as the language of section 258, and the successive changes in the law before it assumed its present form, will amply show. In the Civil Procedure Code of 1877 (Act X of 1877, section 258) the provision on this point was that an adjustment of a decree not certified to the Court whose duty it was to execute it, should not be recognized by *such* Court. The section was amended by Act XII of 1879, which provided that an uncertified adjustment shall not be recognized by *any* Court, and the provision was

(1) 5 B. L. R., 223; 13 W. R. F. B., 69.

1893

AZIZAN v. MATUK LAL SAHU.

re-enacted in that form in the Code of 1882. While this was the law, this Court held in the case of *Ishan Chundr Bandopadhya* v. *Indro Narain Gossami* (1) that *any* Court meant *any Court of execution*, and that suits based on an uncertified adjustment would lie, while a Full Bench of the Bombay High Court in the case of *Abdul Rahiman* v. *Khoja Khaki Aruth* (2) took the opposite view; and then followed the last amendment of the provision by Act VII of 1888, by which it is now enacted in the last paragraph of section 258 that an uncertified adjustment shall not be recognized *as an adjustment* of the decree by any Court *executing the decree.*

It is, therefore, no longer open to any one to contend that an uncertified adjustment of a decree cannot be recognized in a separate suit and be made the basis of relief. It was, however, contended by the learned Counsel for the respondent that though an uncertified adjustment of a decree may be recognized by a Court in a separate suit, such suit can be brought only after the execution proceedings have run out their course, and brought only for damages for the wrongful execution, and that a suit to arrest the progress of the execution proceedings by an injunction is barred by section 244. I am unable to accept this argument as sound. Section 258 by enacting that an uncertified adjustment cannot be recognized *as an adjustment of the decree* by any Court *executing the decree*, implies that it may be recognized *as such* by a Court *trying the matter as a regular suit*; and if it can recognize the adjustment as such and can make it the basis of some relief, as was conceded, and must upon the authorities be conceded, I fail to see why the Court should be precluded from giving effect to the adjustment and granting full relief, or why the wrong-doer should be allowed to use or rather abuse the process of the Court, and the party wronged should be compelled to sit quiet until the wrong—it may be an irreparable one—is completely done, and then seek for compensation as his only remedy, though in many cases it would be a most inadequate one. It was urged that section 244 is answerable for such anomaly and injustice. But, as I have said above, section 244 does not require all this; and sections 244 and 258 may be reconciled in the same way as Sir R. Couch reconciled the corresponding provisions of the old law,

(1) I. L. R., 9 Calc., 788. (2) I. L. R., 11 Bom., 6.

namely by holding that section 244 prohibits a separate suit for the determination of those matters only which can be determined by the Court of execution. Some reliance was placed, in the argument for the respondent, on the Full Bench decision of this Court in *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) and on the decision of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2). Those cases, however, do not directly bear on the present question. So far as they bear upon it they only show that the object of section 244 is a beneficial one, and that it should receive a liberal construction; and that matters relating to execution should be determined as cheaply and as speedily as possible, that is by the Court of execution. But they are not, as I understand them, any authority for the position that a separate suit is barred even as to matters which cannot be determined by the Court of execution.

It was expressly held by Couch, C. J. and Ainslie, J., in the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (3), and by Markby and Mitter, JJ., in *Nujeeni Mullick* v. *Erfan Mollah* (4), that a suit would lie for an injunction to restrain a decree-holder from executing his decree in contravention of an adjustment not certified to the Court. Those cases I think are direct authority in support of the appellant. The learned Counsel for the respondent tried to distinguish those cases from the present, by showing that the provisions of section 244 are more comprehensive than those of section 11 of Act XXIII of 1861, which was the law then in force. But I do not see any real difference so far as the point now under discussion is concerned. It is true that section 244 expressly refers to questions relating to discharge or satisfaction or stay of execution, but they were I think all included in the words, 'any other questions relating to the execution of the decree.'

For all these reasons I think the appeal ought to be allowed, and the decree of the lower Court set aside, and the case remanded to that Court for trial on the merits. But as my learned colleague takes a different view, I agree with him in referring the case under section 575 of the Code of Civil Procedure read with section 587 to

(1) I. L. R., 17 Calc., 769.
(2) I. L. R., 19 Calc., 683; L. R., 19 I. A., 116.
(3) 22 W. R., 194.
(4) 22 W. R., 298.

1893

AZIZAN v. MATUK LAL SAHU.

such other Judge or Judges of this Court as the Chief Justice may appoint.

There being a difference of opinion between the learned Judges who heard the appeal, the case was referred under section 575 of the Civil Procedure Code to Pigot, J., who gave the following decision:—

PIGOT, J.—This case has been referred to me under section 575 of the Code of Civil Procedure.

The facts of the case and the questions of law arising in it are fully stated in the judgments of my learned colleagues. The case comes to this Court in the following manner:—

The plaintiff is one of several judgment-debtors, against whom, as representing Sheikh Mahomed Saleh, father of the plaintiff, the defendant obtained a decree: the decree was in part satisfied by execution. The plaintiff says that after this there was an adjustment of account between plaintiff and defendant in respect of the proportionate share of the decretal amount payable by the plaintiff and the other dues of both parties, including a sum of money due to defendant from the plaintiff's father: that for the amount found due on this adjustment of account the plaintiff executed a mortgage bond to the defendant, in consideration whereof the defendant agreed to exonerate the plaintiff from liability for the remainder of the decretal amount, and promised to file a petition in Court exonerating her from liability. The plaintiff says that, fully relying on the defendant, she did not put in any petition stating the settlement thus come to.

She says that, in violation of the agreement between them, the defendant applied on the 12th March 1890 for execution of the decree against her along with the other judgment-debtors; and that her objection in the execution proceedings was disallowed under section 258 on January 24th, 1891. She says her cause of action accrued on March 12th, 1890, on January 24th, 1891, and every following day.

She asks for a declaration that the defendant did receive the proportionate share of the amount payable by her and exonerated her from liability to the decree; that he has no right to execute it; and that the execution proceedings by him against her are fraudulent.

She prays for an injunction restraining defendant from executing the decree against her, and for an *interim* injunction.

The Subordinate Judge found as to the facts that the plaintiff had altogether failed to prove that the defendant had, as she alleged, discharged her from liability under the decree, and he dismissed the suit. But he held that the plaintiff's suit would not have been barred by section 244 of the Civil Procedure Code had her allegations been proved. The plaintiff appealed from the judgment dismissing the suit on the merits; and the defendant from the decision of the Subordinate Judge holding that the suit was maintainable notwithstanding section 244. For some reason not stated the latter appeal was, by consent, heard first. The appeal on the merits appears not to have been as yet disposed of. The District Judge, disagreeing with the Subordinate Judge, held that section 244 was a bar to the suit, and this appeal is against that decision. The question to be determined in this appeal is therefore in some measure a speculative one. As yet, so far as the plaintiff's case on the merits has been decided, it has been found that she has none; and this appeal is to determine whether, if it should turn out that her case on the facts is, after all, well founded, she would be entitled to the relief which she claims. It is not, at any rate, one of those cases of proved hardship such as have arisen from time to time from the perhaps improvident stringency of section 258, or of the provisions which preceded it. For the appellant it is contended that section 244 does not bar the determination, by a separate suit, of the questions arising between the parties in the present case, that is the determination of *any* of those questions the determination of which is necessary for appellant's success. There are, in the present case, two principal questions which may seem to come within the terms of section 244: one, whether as a fact there was such an adjustment between the parties as the plaintiff alleges; another, whether, if so, the plaintiff is entitled to a perpetual injunction against the execution of the decree. If the determination of either of those questions is barred by section 244, the suit must fail. The first relates to the foundation of the suit, the cause of action without which no suit could be maintained; the second to the relief which the plaintiff seeks in the suit—the only relief, indeed, which at present she could claim,

1893

AZIZAN v. MATUK LAL SAHU.

if she can claim it: she has as yet sustained no damage from the defendant's act in applying for execution, nor been obliged to pay any sum in addition to the security. She goes on the compromise if her story as to that is true.

In considering whether the scope of any suit comes within section 244, I suppose it may be regarded with reference to these two points: 1st, whether the *cause of action* can only be made out by the determination of questions which come within the section; 2nd, whether the *relief claimed* can only be given upon determination of such questions, as for example under the present section 244 upon determination of questions relating to stay of execution.

The numerous cases referred to in the judgments of my learned colleagues have decided that, under section 206 of the old Code and section 11 of Act XXIII of 1861, and under sections 244 and 258 of the later Code, a Civil Court other than a Court executing the decree can recognize an uncertified payment or adjustment of a decree in a suit based upon such payment or adjustment. This goes to the cause of action.

The principle upon which this construction of the section was first adopted is stated in *Gunamani Dasi* v. *Pran Kishori Dasi* (1) and in other cases—in none more fully and clearly than in the judgment of Kindersley, J., in *Viraraghava Reddi* v. *Subbakka* (2). It is that any other construction must leave a judgment-debtor, against whom a decree really satisfied had been inequitably executed, without any remedy whatsoever; and as the construction was possible it should be adopted. [I may observe that the Legislature, when it altered the terms of section 258 by Act VII of 1888, had this course of decisions before it, and I think it must be understood to have affirmed, by the alteration then made, the correctness of them.]

Accordingly it was held in the case of *Gunamani Dasi* v. *Pran Kishori Dasi* and several others that under such circumstances the judgment-debtor might maintain a suit for the money he had paid on the adjustment. So far as the relief thus granted was concerned, no questions coming within section 11 or section 244 arose in *Gunamani Dasi* v. *Pran Kishori Dasi*.

(1) 5 B. L. R. 223; 13 W. R. F. B, 69.
(2) I. L. R., 5 Mad., 397.

In some cases, however, the Courts holding that, on the principle just mentioned, a suit might be maintained, went further and gave a *relief*, which did perhaps come within the prohibition of the section, and to which perhaps that principle did not necessarily apply.

I own that I think such was the case in *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (1), which no doubt would be a binding authority upon this Court if the statutory law then in force still prevailed, but which I think I am at liberty to consider upon the question whether it should be treated as binding now, under a changed state of the law.

In that case, the case of *Gunamani Dasi* v. *Pran Kishori Dasi* was followed as to the right to bring a suit founded on the uncertified adjustment. But, besides the question relating to this, there was, with respect to the relief to be granted, a question which certainly related to the execution of the decree, inasmuch as it was whether the decree should be executed at all.

It was held that it must not be executed, and for the same reason as is urged on the Court in the present case. That reason is, not that to refuse the plaintiff that remedy would leave him without any remedy whatever, and thereby violate a fundamental maxim of the law; but that to abstain from interfering with the execution would leave the plaintiff to be compensated in damages, which might not be an adequate compensation to him." Since the Act of 1861, the Act in force when the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* was decided, the Legislature has, by the Acts of 1877, 1879, 1882, and lastly Act VII of 1888, persistently followed the policy of restricting to the Court executing the decree the determination of all questions relating to the execution of the decree and arising between the parties to it. It has, no doubt, made an exception in the case of an uncertified adjustment, so far as to allow a separate suit to be based upon it. I think that must be taken to be the effect of the later change in section 258. But in Act VII of 1888, in which that section was altered so as to bring it into more complete accordance with the decisions of most of the Courts, an addition to section 244 (*c*) was made, as pointed out by Mr. Justice Macpherson in

(1) 22 W. R., 194.

1893

AZIZAN v. MATUK LAL SAHU.

his judgment in this case, which shows I think very strongly the intention of the Legislature: I refer to the words "or to the stay of execution thereof."

This last mentioned Act was passed soon after the important case of *Abdul Rahiman* v. *Khoja Khaki Aruth* (1) was reported. This Act, by the amendment to section 258, ended the controversy which had arisen on the construction of that section. With the judgments of the High Court of Bombay before it, in which all the cases were examined, and in which the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* was fully discussed, it added the above words to section 244.

I find myself unable to come to any other conclusion than this, that for reasons of policy, which it is not for a Court to contravene, the Legislature has deliberately so framed section 244 as to prohibit in a separate suit between the parties to a decree any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree. I do not see any escape from that conclusion, nor do I think it should be avoided, because possibly individual cases of inconvenience (not of absolute denial of all remedy) may arise from it.

The case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) relied on by Mr. Justice Macpherson in his judgment, is, I think, a case of great importance. I have looked at the record in the case. It was, although this is not noticed in the report, a case of verbal adjustment, not certified. The suit was brought to set aside a sale in execution proceedings carried out in violation of the adjustment. It seems therefore undistinguishable from the case of *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (3) (where the sale was set aside), save that in the Privy Council case persons not parties to the decree were defendants.

This Court (Tottenham and Ghose, JJ.) held that the questions in the suit which had been already raised without success before the Court executing the decree were, as relating to the execution of the decree, barred by section 244, and dismissed the suit, and the Judicial Committee affirmed that decision.

(1) I. L. R., 11 Bom., 6.
(2) I. L. R., 19 Calc. 683; L. R., 19 I. A., 166.
(3) I. L. R., 9 Calc. 788.

No doubt the argument in that case was on the question whether, having regard to the fact that persons not parties to the decree were defendants, the section could apply; and it was on this question that their Lordships reserved judgment in order to examine the decisions in the Indian Courts upon section 244. But this rather strengthens the case as an authority; for it was held that as one of the parties to the decree was a defendant, the suit could not lie, because the questions raised in the suit were, as the Judges of this Court had held, questions relating to the execution of the decree under section 244.

This case, it is to be observed, was decided upon that section as it is stood before it was altered by Act VII of 1888.

There were two questions in the case which, *primâ facie*, might seem to come within section 244: first, whether a suit would lie on the uncertified adjustment; and, second, whether the relief claimed, namely the setting aside of the sale had in execution, involved the determination of a question relating to the execution of the decree. Neither in the judgment of this Court nor in that of the Judicial Committee, does it appear whether it was decided that both of these questions or only one of them was held to bring the case under section 244.

If the first question was thought to be within section 244, that would be at once to sweep away the whole course of decisions of which the case of *Gunamani Dasi* v. *Pran Kishori Dasi* is one. But it is difficult to suppose that this could have been intended by their Lordships, who do not refer in the judgment to that class of cases; and Sir Richard Couch, who decided the case of *Gunamani Dasi* v. *Pran Kishori Dasi*, was a member of the Board which decided the appeal in the Privy Council. It seems safer to conclude that the questions held to be barred were those relating to the relief claimed, and so far the decisions seem to overrule the case of *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (1) and the case of *Sakharam Ramchandra Dikshit* v. *Govind Vaman Dikshit* (2) before West, J., referred to by Sargent, C.J., in *Mukund Harshet* v. *Haridas Khemji* (3).

(1) I. L. R., 9 Calc., 788. (2) 10 Bom., 361.
(3) I. L. R., 17 Bom., 23, (28).

1893

AZIZAN v. MATUK LAL SAHU.

I may say here that the case just mentioned (*Mukund Harshet* v. *Haridas Khemji*) relied on for the appellant, was not a suit on an uncertified adjustment of a decree, but on an agreement made before the decree came into existence.

I own that as to the relief by way of injunction granted in that case it does seem to me not to be consistent with the decision of the Privy Council as to the scope of the words "relating to the execution, &c.," and I think, therefore, that I am bound to conclude that, had that decision been before the Court, the case of *Mukund Harshet* v. *Haridas Khemji* would have been otherwise decided.

It appears to me that *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1) is an authority for the opinion expressed by Mr. Justice Macpherson, with which I agree.

Upon these grounds I think the suit was rightly dismissed by the District Judge and that this appeal should be dismissed.

But I think I ought also to express my opinion that upon the grounds stated by Mr. Justice Farran in *Abdul Rahiman* v. *Khoja Khaki Aruth* (2) at pages 29 and 30 of the report, where the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (3) is discussed, I should find it impossible, apart from the construction of section 244, to hold the plaintiff entitled to maintain this suit. That learned Judge says: "There was, however, before Act XII of 1879 came into operation, another class of cases, by which it was in effect held that an uncertified adjustment of a decree out of Court, though it could not be recognized by the Court concerned with the execution of the decree, yet might be recognized by the same Court as an adjustment of its decree, if the jurisdiction of that Court were invoked by a separate suit. I refer to the cases of *Nujeeni Mullick* v. *Erfan Mollah* (4), where it was held 'that a suit to enforce a contract (uncertified) by which a dispute was adjusted between a decree-holder and a judgment-debtor could be maintained;' to *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (1), where an injunction was issued to restrain the judgment-creditor from executing his decree, on the ground of an uncertified

(1) I. L. R., 19 Calc., 683; L. R., 19 I. A., 166.
(2) I. L. R., 11 Bom., 6.
(3) 22 W. R., 194.
(4) 22 W. R., 298.

adjustment; and to *Dhuronidhur Sen* v. *Agra Bank* (1). These rulings were, I think, admissible under the wording of the law as it stood when they were passed; but it appears to me to be an anomaly that in one branch of its jurisdiction a Court should be forbidden to recognize an uncertified adjustment of its decree, and that in another branch of its jurisdiction it should be permitted to recognize the same uncertified adjustment of the same decree and for the same purpose; that in the latter branch it should issue an injunction in effect against itself in the former branch, and this, too, in the face of the declared expression of the will of the Legislature that all questions between the parties to a suit relating to the execution of a decree shall be dealt with by the Court executing the decree, and not by separate suit. The power of the Court in each branch of its jurisdiction to inquire into the alleged adjustment by the examination of witnesses is the same, and in each case its decision is open to appeal. I am unable to discover any ground upon which the anomaly can be defended. It is opposed alike to the wording and spirit of section 56 of the Specific Relief Act, I of 1877."

Further, the circumstances of this case are different from those in the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry*. In the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* the suit was brought to restrain the defendant in it from *applying* to execute the decree. No execution proceedings had been commenced.

In this case the Court of the Subordinate Judge has had before it, since the 12th March 1890, the proceedings in execution, in the course of which that Court rejected the plaintiff's objection. The Court which is asked to grant the injunction is asked to restrain its own proceedings; it is now actually the Court executing the decree. It appears to me that it would be a serious anomaly that the Court executing the decree, in which character it cannot recognize the uncertified adjustment, should have the power at pleasure of divesting itself of that character in order to enable it to take cognizance of the adjustment for the purpose, by its own order, of putting an end to its own existence as a

(1) I. L. R., 4 Calc., 380.

1893

AZIZAN v. MATUK LAL SAHU.

Court executing the decree, and getting rid of the execution proceedings, in which it is bound by law to disregard the adjustment. It is true that Sir C. Sargent, C. J., in the case of *Swamirao Narayan Deshpande* v. *Kashinath Krishna Mutalik Desai*(1) says (at page 421 of the report) that since Act VII of 1888 the payment or adjustment may be recognized by a Civil Court, "except when executing the decree." I do not understand the Chief Justice to suggest that the prohibition only applies to the Court during the moments it is actually engaged upon the execution proceedings. I understand these words to be equivalent to "except when execution proceedings are pending in the Court." I think that so long as execution proceedings are pending in a Court, it is a Court executing the decree, and the prohibition applies to it.

I think, therefore, that the case of *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* is not an authority applicable to the present one, assuming that under the law as it now stands it could be followed.

I think the appeal should be dismissed with costs.

There can be no doubt that upon this which seems to me and to Mr. Justice Macpherson a necessary construction of the law as it stands, some hardship is inflicted upon a judgment-debtor who has paid the decretal amount, as a consequence of his having neglected to avail himself of his right to compel the decree-holder to certify. The hardship arises from the very short period of limitation allowed for such an application. Were that period extended to a year, and made to run from the time the judgment-debtor learned that the decree-holder had neglected the statutory duty of certifying,—a duty for the violation of which no penalty is imposed,—I cannot help thinking that much costly litigation would be avoided.

Appeal dismissed.

C. S.

(1) I. L. R., 15 Bom., 419.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

JAGANNATH CHURN AND OTHERS (DEFENDANTS) *v.* AKALI DASSIA AND OTHERS (PLAINTIFFS).*

1893 *Dec.* 31.

Jurisdiction of Civil Court—Civil Procedure Code, 1882, *s.* 11—*Suit for right to property and for office or emolument—Suit relating to caste questions—Right of suit—Suit by bhakats of religious fraternity expelled by other members for re-admission into fraternity—Powers of fraternity to impose fine and cause expulsion until fine is paid—Cause of action.*

The plaintiffs were some of the *bhakats* or members of a *satra* or religious fraternity, and they claimed the right to enter the *kirtanghar* or prayer-hall, and perform their prayers and other rites therein. They alleged in the plaint that the management of the affairs of the *satra*, "including the distribution of honorarium and offerings and the appointment and dismissal of the *satria*," or head of the fraternity, was vested in the *samuha*, or entire body of *bhakats*, and that they and their forefathers had been from generation to generation in receipt of the honorarium and offerings, and had been performing the rites and ceremonies according to the custom of the *satra* until they had been obstructed and interfered with by the defendants in such performance and had been expelled from the *kirtanghar*. The prayer of the plaint was that the plaintiffs' right to enter the *kirtanghar* to perform the said rites and ceremonies and to receive their share of the offerings might be established; that the *kirtanghar* from which they had been dispossessed might be made over to them for the purpose of such performance, and that a prohibitory injunction might be granted enjoining the defendants not to obstruct them in such performance. The defendants, who were the *satria* and the other members of the fraternity forming the majority of the entire body of *bhakats*, denied the rights claimed by the plaintiffs as *bhakats*, and stated that the *satra* was governed by the *satria* and a select body of *bhakats*, that the plaintiff No. 1 had received *mantra* or spiritual initiation from one Saruram, contrary to the rules of the fraternity, and had been convicted moreover of a criminal offence, and a fine of Rs. 100 had accordingly been imposed on him and his partizans by the governing body of the *satra*, whose orders they had disobeyed by refusing to pay the fine, and they had, therefore, been excluded from entering the *kirtanghar*: and the defendants contended that the

* Appeal from Appellate Decree No. 146 of 1892, against the decree of A. A. Wace, Esq., Officiating Judge of the Assam Valley Districts, dated the 7th of October 1891, modifying the decree of Babu Shibo Prasad Chuckerbutty, Extra Assistant Commissioner and Munsif of Gowhatti, dated the 31st of July 1890.

1893

JAGANNATH CHURN v. AKALI DASSIA.

Civil Court had no jurisdiction in the matter and that the suit was, therefore, not maintainable. The Lower Courts held that the Civil Court could entertain the suit, and they made decrees practically ordering the admission of the plaintiffs to the *kirtanghar* on their complying with the order imposing the fine. *Held*, that having regard to the prayer for possession of the *kirtanghar*, and to the allegations made in the plaint about the position and privileges of the *bhakats* and their rights to honorarium and offerings, and to the defendants' denial of those rights and of the plaintiffs' right to enter the *kirtanghar*, the suit must be regarded as one in which right to property and to an office, within the meaning of the explanation to section 11 of the Civil Procedure Code, is contested, and, therefore, notwithstanding that the honorarium and offerings were of trifling and merely nominal value, one of a civil nature and cognizable by the Civil Court.

Held also, that the rules laid down in the English cases as to expulsion from clubs or voluntary associations which people are free to join or not, and where any one who joins may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules, are not applicable with regard to caste unions or religious fraternities in India, to which people belong not of choice but of necessity, being born in their respective castes or sects, and the consequences of exclusion from which are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. In such religious castes or fraternities the protection of Courts of Justice, even though presided over by judges of a different religious persuasion, against expulsion, is much more needed than in clubs or voluntary associations. Cases of expulsion from them were, therefore, cognizable by the Civil Court. *Sudharam Patar* v. *Sudharam* (1), *Hopkinson* v. *Marquis of Exeter* (2), and *Dawkins* v. *Antrobus* (3), distinguished; *Gopal Gurain* v. *Gurain* (4), and *Ramkant* v. *Ram Lochan* (5), followed. *Advocate-General of Bombay* v. *Haim Devakar* (6), not followed.

Held, further, that even if the rules laid down in the English cases were applicable, they were subject to a qualification which leaves it open to a Court of Justice to interfere with the decision of a private association on grounds, one of which is that the decision is contrary to natural justice. The decision of the Lower Courts therefore ordering the re-admission of the plaintiffs to the *kirtanghar*, on their complying with the order imposing the fine, was not such an interference with the decision of the domestic tribunal of the parties as is opposed to the cases cited as to clubs, &c., as it would have been contrary to natural justice for the fraternity to enforce such exclusion after the reason for it had ceased, and make the disqualification of the plaintiffs permanent.

(1) 3 B. L. R., A. C., 91; 11 W. R., 457.
(2) L. R. 5 Eq., 63.
(3) L. R. 17 Ch. D., 615.
(4) 7 W. R., 299.
(5) S. D. A., 1859, p. 535.
(6) I. L. R., 11 Bom., 185.

Held, on the statements in the plaint, that the plaintiffs had a cause of action, and the suit could not have been properly dismissed on the finding of fact by the Lower Appellate Court that the plaintiffs' exclusion from the *kirtanghar* was justified by their refusal to pay the fine imposed on them.

THIS suit was brought to establish the plaintiffs' alleged right to perform *nams*, *prasangs*, and *kirtan* in the *kirtanghar* or prayer-house at the Chamaria *satra*, from which right they stated the defendants had excluded them.

The land on which the *kirtanghar* stood was granted by one of the Assam Rajas in Joistho 1693 to the ancestors of the plaintiffs and defendants for religious purposes, consisting of the singing and hearing of divine songs and texts; and the plaintiffs alleged that from the time of the establishment of the *satra* the forefathers of themselves and the defendants who were the then *satria* and *bhakats* of the *satra* had from generation to generation been performing *nams*, *kirtan* and *prasangs* in conformity with the ancient customs of the *satra* and receiving *nirmalyas* and *prasads* (consecrated flowers, leaves, offerings of rice, fruit, &c.) according to custom, and in the enjoyment of their respective privileges and honorariums had been performing the *harinam* and the function of praying and hearing which are the essential features of the religion of the *satra*; that all the affairs of the *satra*, the distribution of honorariums, *nirmalya*, &c., amongst members of the collective body of *bhakats* according to their rank and gradation, the appointment and dismissal of the *satria* vested with the *samuha*, or entire body of *bhakats*, in general; no individual member could have any exclusive right or authority in the matters just mentioned against the wishes and opinions of the general body of *bhakats* of the *satra*; that the plaintiffs had been in enjoyment of the above-mentioned rights and privileges in the *satra* up to the 2nd Magh 1294, when, as they stated in the 6th paragraph of the plaint, on the occasion of their entering the *satra* to perform *nams* and *prasangs* on the occasion of a festival, they were wrongfully expelled therefrom by the defendants who denied all their rights and privileges, obstructed them in the performance of the *prasangs* and forbade them to perform *nams* and *prasangs* any longer in the *satra*, or to participate in the offerings made in the *satra*, and had thus dispossessed them.

1893

JAGANNATH CHURN v. AKALI DASSIA.

The plaintiffs prayed that their right to enter into the *kirtanghar* to perform *nam* and *prasang*, to listen and pray, as well as to receive their share of the offerings be established, and the *kirtanghar* from which they had been dispossessed, made over to them for the purpose of performing the said rites and functions, and for an injunction enjoining the defendants not to obstruct them in such performance.

The defence was that there was misjoinder of parties; that the suit was not properly valued and, moreover, was barred by limitation; that the plaintiffs were bound to obey the rules of the *satra* and the orders of those in whom the management of the *satra* was vested, namely, the *satria* or head superintendent, the first defendant, and the select assembly of *bhakats*; then it was stated in paragraph 9 of the written statement that, in Aughran 1883, the plaintiff No. 1 disobeyed the rules of the *satra* by accepting spiritual advice from one Saruram instead of from the *satria*, and accordingly a fine of Rs. 100 was imposed on him and some of his partizans under a long-standing rule of the institution, and as they had made default in payment of the fine they had been expelled from the *satra*, and that a civil suit would not lie to determine the rights claimed; and in paragraph 13 of the written statement it was stated that the plaintiff No. 1, having received spiritual advice from Saruram, wilfully violated the rules of the institution; he was then convicted of a grave offence, fined and sentenced to imprisonment by a Criminal Court, and was, therefore, debarred from entering into the *kirtanghar* by the custom of the institution which deprived all criminals of that description from all privileges of the *satra*; the defendants therefore denied that the plaintiffs had the rights and privileges they claimed and their right to enter the *kirtanghar*.

The first Court found the issues of misjoinder, improper valuation, and limitation in favour of the plaintiffs; but it found that the plaintiffs by taking spiritual advice from Saruram had disobeyed the rules of the institution and was properly fined, but reduced the amount of the fine to Rs. 20, on payment of which they were to be entitled by the custom of the *satra* to enter the *kirtanghar* to perform the rites and functions they claimed without obstruction from the defendants; and an injunction to the above effect was issued

On appeal by the defendants the Judge agreed with the first Court as to the pleas in bar of the suit; and he held that although the plaintiffs had the right to perform religious ceremonies in the *kirtanghar* they were bound to abide by the rules of the *satra* and were properly fined for not doing so; but he was of opinion that the fine was a matter with which a Civil Court could not interfere, and that the first Court had, therefore, acted without jurisdiction in reducing its amount: that the fine was a matter entirely in the discretion of the *satria*, and the majority of the *bhakats*, which the first Court should not have interfered with; and that the relief asked for by the plaintiffs could only be granted on the condition of their conforming to the rules of the *satra*, and complying with the decision of the majority of the *bhakats*, and paying the fine of Rs. 100. With this modification of the first Court's decree the Judge dismissed the appeal.

The defendants appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Promotho Nath Sen* for the appellants.

Babu *Mohini Mohun Roy* and Babu *Baikanta Nath Das* for the respondents.

The grounds of appeal, arguments, and cases cited are sufficiently stated in the judgment of the Court (BANERJEE and RAMPINI, JJ.) which was as follows:—

This appeal arises out of a suit brought by the plaintiffs, respondents, who are some of the *bhakats*, or members of a religious fraternity, in Assam, against the *satria*, or head of the fraternity, and the other members, for establishment of their right to enter into and perform their prayers and other rites in a *kirtanghar*, or prayer-hall, from which they allege they have been wrongfully dispossessed by the defendants, for having the said *kirtanghar* made over to them, and for a perpetual injunction restraining the defendants from interfering with the plaintiffs in the performance of the said rites. The plaintiffs allege in their plaint that the management of the business connected with the *satra*, or religious union, including the distribution of honorarium and offerings and the appointment and dismissal of the *satria*, or head, is entrusted with the *samuha*, or entire body of *bhakats*;

1893

JAGANNATH CHURN v. AKALI DASSIA.

and that they and their forefathers have been from generation to generation in receipt of honorarium and offerings and have been performing rites and ceremonies according to custom.

The defence was that the suit was bad for misjoinder of plaintiffs, that its true value was beyond the limits of the pecuniary jurisdiction of the Court; that it was barred by limitation; that the plaintiffs were not entitled to the rights they claimed for themselves as *bhakats*; and that plaintiff No. 1 having received *mantra*, or initiation, from one Saruram, contrary to the rules of the fraternity, and having been convicted of a criminal offence, and he and his partizans having disobeyed the order of the fraternity directing them to pay a fine, they had been debarred from entering the *kirtanghar*.

The first Court overruled all the pleas in bar, and on the merits it found that the plaintiffs as *bhakats* were entitled to the rights they claimed; but that plaintiff No. 1, by receiving *mantra* from Saruram, had disobeyed the rules of the brotherhood, and had been justly fined for that offence. It held, however, that the amount of the fine, which was Rs. 100, was excessive, and it reduced the amount to Rs. 20, and gave the plaintiffs a decree upon condition of their paying Rs. 20 to the *satra*.

On appeal by the defendants, the Lower Appellate Court has held that the defendants, who form the majority of the *bhakats*, were entitled by the customary rules of the fraternity to impose the fine of Rs. 100 and to enforce the payment of the fine by excluding the plaintiffs from the *kirtanghar*, and it has further held that the Civil Courts have no jurisdiction to alter the amount of the fine imposed, and it has accordingly varied the decree of the first Court and decreed the suit on condition of the plaintiffs conforming to the rules of their order and complying with the decision of the majority of the *bhakats*.

Against that decree the defendants have preferred this second appeal, and it is contended on their behalf, *first*, that the suit should have been dismissed as it was not cognizable by the Civil Courts, it being a suit not of a civil but of an ecclesiastical nature; *secondly*, that even if the suit was of a civil nature, still the Courts below should have held that they had no jurisdiction to interfere with the decision of the majority of the *bhakats* by which the

plaintiffs had been excluded from the prayer-hall; and, *thirdly*, that even if the Civil Courts had jurisdiction to interfere with the decision of the majority of the *bhakats*, upon the facts found by the Lower Appellate Court, that the fine had been justly imposed and the plaintiffs justly excluded by reason of its non-payment, the present suit should have been dismissed.

We do not think that the appellants are entitled to succeed upon the first point. Having regard to the prayer for possession of the *kirtanghar* and to the allegations made in the plaint about the position and privileges of the *bhakats* and their rights to honorarium and offerings, and to the defendants' denial of those rights and of the plaintiffs' right to enter the *kirtanghar*, we think the suit must be regarded as one in which right to property and to an office within the meaning of the explanation to section 11 of the Code of Civil Procedure is contested, and that being so, the suit must be regarded as a suit of a civil nature and cognizable by the Civil Courts. That similar suits have been entertained by our courts will appear from *Debendro Nath Mullick* v. *Odit Churn Mullick* (1), *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (2), and *Vengamuthu* v. *Pandaveswara Gurukal* (3).

It was argued that the honorarium and offerings were of trifling and merely nominal value, and that the fact of the suit involving a dispute as to these was not, therefore, sufficient to make it a suit of a civil nature; and in support of this argument *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (4) was referred to. But there is no finding as to the value of the honorarium and offerings, nor were the Courts below called upon to arrive at any finding on this point when no objection was raised before them that the suit was not cognizable by the Civil Courts.

In support of the second contention of the appellants, namely, that even if the suit was of a civil nature, within the meaning of section 11 of the Code of Civil Procedure, it was not competent to the Civil Courts to interfere with the decision of the majority of the *bhakats*, we were referred to *Sudharam Patar* v. *Sudharam* (5),

(1) I. L. R., 3 Calc., 390.
(2) I. L. R., 7 Bom., 323.
(3) I. L. R., 6 Mad., 151.
(4) I. L. R., 10 Bom., 233.
(5) 3 B. L. R., A.C. 91; 11 W. R., 457.

1893

JAGANNATH CHURN v. AKALI DASSIA.

Advocate-General of Bombay v. *Haim Devakar* (1), *Hopkinson* v. *Marquis of Exeter* (2), and *Dawkins* v. *Antrobus* (3).

Now in the first place we do not think that the rule laid down in these cases is applicable to the present case. The English cases cited are cases of expulsion from clubs or voluntary associations which people are free to join or not, and where any one who joins any such an association may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules. The case, however, is very different with regard to castes or religious fraternities like the one before us. As a rule, people do not join them as a matter of choice; they belong to them as a matter of necessity; they are born in their respective castes or sects; and the consequences of exclusion from caste or sect are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. The protection of Courts of Justice, even though presided over by Judges of a different religious persuasion, against expulsion seems, therefore, to be much more needed in the one case than in the other. The case of *Sudharam Patar* v. *Sudharam* (4) is expressly stated to be one in which the exclusion complained of was not one from caste, but only from a *samaj* or association of a purely social nature, whereas the fraternity from which exclusion is complained of here is altogether of a different character. The Bombay case [*Advocate-General of Bombay* v. *Haim Devakar* (1),] is no doubt more in point, but as it is opposed to the decisions on this side of India [See *Gopal Gurain* v. *Gurain* (5) and *Ramkant* v. *Ram Lochan* (6),] with all respect for the learned Judge who decided that case, we must follow, as we are bound to do, the decisions of our own Court in preference to it.

In the second place, even if the rule laid down in the cases cited by the learned vakil for the appellants was applicable here, still that rule is subject to an important qualification which leaves it open to Courts of Justice to interfere with the decision of a private association, if it is shown, in the first place, that the rules of

(1) I. L. R., 11 Bom., 185.
(2) L. R., 5 Eq., 63.
(3) L. R. 17 Ch. D. 616.
(4) 3 B. L. R., A. C. 91; 11 W. R., 457.
(5) 7 W. R., 299.
(6) S. D. A., 1859., p. 535.

the association according to which the decision is arrived at, to use the language of Lord Justice Brett in *Dawkins* v. *Antrobus*, are contrary to natural justice, or, secondly, that the decision is against the rules of the association, or thirdly, that the decision has not been come to *bonâ fide*. Now, in the present case the decision of the majority of *bhakats* has, been left untouched by the Lower Appellate Court, so far as the propriety of their imposing the fine of Rs. 100 goes, and so far also as the propriety of their excluding the plaintiffs from the prayer-hall until the payment of the fine is concerned; and the only extent to which the decision of the learned Judge below is against the wish of the defendants, appellants, is that he has ordered the re-admission of the plaintiffs into the *kirtanghar* upon their complying with the order imposing the fine. Is this such an interference with the decision of the domestic tribunal of the parties as is opposed to the cases cited? We think not. However reasonable it may be that the payment of the fine imposed should be capable of being enforced by exclusion from the prayer-hall until such payment, there is no finding that a refusal to pay the fine should, according to the customary rules of the congregation of *bhakats*, produce permanent disqualification to enter the *kirtanghar*, which cannot be removed by any subsequent payment of the fine. And, even if there had been a finding that there was any such rule, we should have felt bound to hold that it was contrary to natural justice. The very fact of the congregation, in the first instance, imposing a fine for the offence of the plaintiffs, whatever it was, shows that it was expiable by payment of money and did not in itself entail permanent exclusion from the fraternity; and it would be contrary to natural justice to enforce such exclusion even after the reason for it has ceased. We are, therefore, of opinion that the second point urged before us must also fail.

It remains now to consider the third point, which was very strongly pressed before us, namely, that upon the finding of fact arrived at by the Lower Appellate Court, that the exclusion of the plaintiffs from the *kirtanghar* was justified by their refusal to pay the fine imposed on them, their present suit should have been dismissed and the conditional decree made should not have been granted. It was argued that, upon the facts found, the plaintiffs had no cause of action. We do not think that this contention is sound.

1893

JAGANNATH CHURN v. AKAIL DASSIA.

Let us see whether there was or was not a cause of action, and for that purpose let us examine the statements of the plaintiffs in their plaint, and let us also examine the statements of the defendants in their written statements; not that the defence can in any way give rise to a cause of action that did not exist before, or complete a cause of action that was incomplete before, but the statements of the defendants may throw light on the question what was the real nature and extent of the infraction of right complained of.

Now the plaintiffs in their plaint (see paragraph 6) allege that the defendants wrongfully expelled them from the temple, denying all their rights and forbidding them to perform their prayers any longer in the *satra*, and they claim to be entitled to re-admission. Here there is an allegation of complete and not merely temporary exclusion from the prayer-hall. It is true that the plaint most disingenuously omits all allusion to the fine of Rs. 100 which is now found to have been justly imposed, and asks for an unconditional decree for re-admission. This is certainly most reprehensible. But the proper penalty for that is disallowance of costs and not dismissal of the claim. In answer to the claim made, the defendants did not deny that there was a permanent exclusion, nor did they contend that there was no cause of action because the plaintiffs' right to enter the prayer-hall had only been suspended so long as the fine imposed on them remained unpaid, and that they were not entitled to sue for re-admission into the temple until the fine was paid, but, on the contrary, they asserted (see paragraphs 9 and 13 of the written statement) that the plaintiffs had been expelled from the *satra* for refusal to pay the fine, and that they were debarred from entering it; and there being no denial of the existence of a cause of action, no issue was raised on the point, and no finding has been arrived at by either of the Courts below as to whether there was or was not a complete cause of action. For this, however, the plaintiffs should not suffer. The real fault in the plaintiffs' case then is not that the plaintiffs ask for relief—when there was no occasion for their doing so,—but that they ask for relief unconditionally when they ought to have asked for it on condition of their obeying the order for fine. They may not be entitled to the larger measure of relief they ask for, but that does not show that they are not entitled to any relief at all.

The grounds urged before us therefore all fail.

1893

JAGANNATH CHURN v. AKALI DASSIA.

The decree of the Lower Appellate Court, however, requires to be made more explicit as to the condition imposed, and that should be done by expressly stating that the relief that is granted to the plaintiffs is granted on the condition that they conform to the rules of their order, and within three months from the date of this judgment pay to the treasury of the *satra*, or to the defendants, or deposit in Court for the purpose of being so paid the sum of Rs. 100 which the plaintiffs were required by the decision of the majority of *bhakats* to pay. In all other respects that decree will stand. Under the circumstances each party will bear his own costs.

Decree varied.

J. V. W.

Before Sir W. Comer Petheram, Kt., C.J., Mr. Justice Prinsep, and Mr. Justice Trevelyan.

MOHABIR PROSAD SINGH AND OTHERS (PLAINTIFF) *v.* ADHIKARI KUNWAR AND OTHERS (DEFENDANT).*

1894 *Feb. 2.*

Letters Patent, High Court, cl. 15—Order refusing to stay execution decree for costs—Civil Procedure Code (Act XIV of 1882), s. 608—Security for costs—Costs.

An order refusing to stay execution in the exercise of the discretion given to the Court under s. 608 of the Civil Procedure Code is not a decision which affects the merits of any question between the parties by determining a right or liability, and no appeal from such an order will lie under cl. 15 of the Letters Patent.

APPEAL under cl. 15 of the Letters Patent against the order of a Senior Judge of a Division Bench passed on an application made by the appellants for stay of execution of a decree passed against them for costs and against which an appeal had been preferred to Her Majesty in Council.

* Letters Patent Appeal, of 1893, against the order of Mr. Justice Norris, the Senior Judge of a Division Bench, dated the 5th September 1893, in an application made in the appeal to Her Majesty in Council, No. 32 of 1892.

1894

MOHABIR PROSAD SINGH v. ADHIKARI KUNWAR.

It appeared that the plaintiffs, appellants, had sued the defendants, respondents, to recover possession of certain immoveable properties of which the defendants, respondents, were in possession, and that such suit had been dismissed in the Original and Appellate Courts with costs.

The appellants, however, obtained leave to appeal to Her Majesty in Council against the decree of the High Court dismissing the appeal with costs, and thereupon obtained a rule calling upon the respondents to show cause why execution should not be stayed pending such appeal, on the ground that the respondents had no property save that in dispute in the appeal to Her Majesty in Council, and that in the event of the appellants being successful in such appeal they would be unable to get back the amount decreed against them as costs if execution for costs were not stayed.

This rule came on for hearing before NORRIS and BANERJEE, JJ.

NORRIS, J., was of opinion that no "special cause" within the meaning of s. 608 of the Civil Procedure Code had been made out for staying execution, whilst BANERJEE, J., was of opinion that the circumstances disclosed by the appellants amounted to "special cause" within the meaning of that section, and considered that the ends of justice would be best met by allowing the decree for costs to be enforced, upon taking sufficient security from the respondents for the due performance of any order which Her Majesty in Council might make.

The rule, however, was discharged in accordance with the decision of the Senior Judge.

The appellants appealed under s. 15 of the Letters Patent.

Babu *Saligram Singh* for the respondents took the preliminary objection that there was no appeal, the order not being a judgment within the meaning of cl. 15 of the Letters Patent, and referred to *Lutf Ali Khan* v. *Asgur Reza* (1), contending that no issue as to the rights of the parties had been determined by the order. [TREVELYAN, J., referred to the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2)].

(1) I. L. R., 17 Calc., 455. (2) 8 B. L. R., 433 (452).

Mr. *Gregory* (with him Babu *Durga Dass Datta*) for the appellants distinguished the case of *Lutf Ali Khan* v. *Asgur Reza* (1) as being an appeal from a decision of a single Judge passing ministerial orders in the Privy Council Department.

The judgment of the Court (PETHERAM, C.J., PRINSEP and TREVELYAN, JJ.) was delivered by

PETHERAM, C.J.—We think that in this case there is no appeal from this order, and that this appeal, consequently, must be dismissed.

The law is correctly laid down in the judgment of the Chief Justice and Mr. Justice Markby which is to be found in *The Justices of the Peace for Calcutta* v. *Oriental Gas Company* (2) The Chief Justice there says (p. 452 of the report): "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

That being the law, the question is, whether a refusal to exercise the discretion given by section 608 to a Judge or Bench of this Court to order security for costs is a decision which affects the merits of any question between the parties by determining some right or liability. In our opinion such a refusal affects no right or liability by determining any question which affects the merits of the dispute between the parties in any sense. For these reasons we think that no appeal lies to this Court under section 15 of the Letters Patent, and this appeal must be dismissed with costs.

Appeal dismissed.

T. A. P.

(1) I. L. R., 17 Calc., 455. (2) 8 B. L. R., 433 (452).

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

1894. *Feb.* 15.

RATTAN KOER (PETITIONER) *v.* CHOTAY NARAIN SINGH (OPPOSITE PARTY).*

Practice—Evidence—Exhibits marked for identification afterwards marked as "admitted on both sides" by Bench Clerk—Certificate by Court as to the endorsement on exhibits—Record of appeal to the Privy Council.

In an application for a certificate that a limited meaning should be placed upon endorsements made by the Bench Clerk on certain exhibits printed in the paper-book in the suit, which had gone on appeal to the Privy Council, the Court considering the reasons for the application to have arisen from the nature of the case and from the contentions on either side, left the matter to be dealt with by their Lordships of the Judicial Committee, at the same time directing its order to be forwarded to the Privy Council.

THIS was an application made to amend or to certify to the circumstances of endorsements made by the Bench Clerk of the 1st Division Bench on two documents in the record of this case, marked as exhibits 1 and 2.

It appeared from the petition verified by affidavits filed on this application that the petitioner, Rajkumari Rattan Koer, on the 7th April 1890, applied to the District Judge of Gaya under Act V of 1881 for letters of administration under the last will and testament of the late Rajah Run Bahadoor Singh of Tekari, and that one Chotay Narain Singh entered caveats and filed his objections thereto, contending that the will was a forgery, and amongst other documents filed in Court in support of his case two letters dated the 10th Bhadro 1292 and the 28th Assin 1293 F.S. respectively, purporting to be letters under the signature of the late Rajah.

The letter of the 28th Assin 1293 was put to one Deb Narayan, a witness on the side of the petitioner, on the 1st August 1890, during his cross-examination, whereupon the said Deb Narayan stated that the seal on the document was not the seal of the late

* Application in appeal from original decree No. 57 of 1891.

Rajah; this letter was marked No. 1 for identification by the District Judge. The letter of the 10th Bhadro being marked No. 2, for identification on the 2nd August 1890, the District Judge recorded on his order sheet, with reference to one of these letters, the following order:—

"The Court thought it right in the interest of both parties to remark, with reference to the seals on exhibit F and on the paper marked No. 1 for identification, that it was satisfied after examination that they were not both impressions of the same seal (whether the one, or the other, or both, or neither, were genuine). Both the seals, *i.e.*, the impressions, had been shown to the first witness for identification, and so they had come before the notice of the Court. As the remark was made, it has been placed on record."

After this order no questions were put to the petitioner's witnesses by the caveator's legal advisers with reference to these letters, nor was their genuineness proved in any way: whilst on the other hand the two letters were put to one Sujeewan Lall a witness for the petitioner, by her pleader, and such witness deposed that the seal and signature on the letters marked 1 and 2 for identification were not those of the said Rajah.

On appeal to the High Court from the order passed by the District Judge, the petitioner's Counsel in the course of his argument referred to the said two letters as indicating an attempt on the part of the respondent's advisers to meet the case by forgery, and observed that as soon as the forged character of these letters had become apparent, and the order of the 2nd August 1890 had been recorded, the said respondent had abandoned all idea of relying on these letters and took no steps to prove them; and that thereupon Counsel for the respondent objected to their being read or referred to, on the ground that, though printed in the paper book, they were marked for identification only, and had not been admitted in evidence, and thereupon Counsel for the petitioner stated that though he in no wise admitted their genuineness, he had no objection to their being admitted in evidence and marked as exhibits. A decree was made on the 18th December 1891 by the High Court in favour of the respondent, and the appellant thereupon obtained leave to file an appeal to Her Majesty in Council. The petitioner's legal advisers were unaware of the endorsements,

1894

RATTAN KOER v. CHOTAY NARAIN SINGH.

"Admitted on both sides.—H. A. T., Clerk, 1st Bench," placed upon these two letters by the Bench Clerk during the hearing of the said appeal and subsequently to the above statement, and the same did not come to their knowledge until December 1893, when the draft case drawn by Counsel in England on behalf of the petitioner was received by the petitioner's pleader at Gaya, when the said pleader at once came down to Calcutta to enquire into the matter.

On these facts Rajkumari Rattan Koer, considering that the endorsements as made might be taken to be an admission of the genuineness of the two letters, applied to the Division Bench before which the appeal had been heard for a certificate declaring that the genuineness of the two letters had not been admitted by her, or for amendment of the endorsements.

In reply to the above facts no counter-affidavit was filed.

The *Advocate-General* (Sir *Charles Paul*), with him Mr. *Woodroffe*, for the applicant, contended that as the endorsements had been made inadvertently, an amendment of the endorsements should be made, or a certificate given by the Court, as was done in *Doe d. Seebkristo* v. *East India Company* (1), and referred to *Amir Ali* v. *Indurjeet Singh* (2).

Sir *Griffith Evans* (with him Mr. *Jackson*) for the respondents contended that this was an unprecedented application, and that the Code did not allow of it being made; that the Court was *functus officio*, the appeal to the Privy Council having been allowed and the transcript having been sent to England; that a list of the documents to be used in the appeal had been sent to the applicants on the 15th June and 15th July 1892, and the transcript sent to England in March 1893. The matter should therefore have been brought to the notice of the Court before. The case of *Amir Ali* v. *Indurjit Singh* was no authority for this application, as there the certificate was sent with the transcript, the Court having had an appeal forced upon it in violation of the agreement to compromise.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

This is an application on behalf of the respondent in an appeal for a certificate by this Court that the note of the Bench

(1) 6 Moo. I. A., 267. (2) 9 B. L. R., 460. 14 Moo. I. A., 203.

Clerk which is printed in the paper book has a particular limited meaning only. Neither of us has any note of the matter to which the application referred, and we have not, nor has the Bench Clerk, any recollection of the circumstances under which the note came to be made by the Bench Clerk, but the note as printed is a copy of the note which appears in his book. The reasons given by the respondents why the note should bear the limited meaning they seek to place upon it are reasons arising from the nature of the case and of the contentions on either side, and when the whole matter is before their Lordships of the Judicial Committee they will be in a position to deal with them. Let these remarks be sent with the case to the Privy Council.

T. A. P.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

MINATOONNESSA BIBEE AND OTHERS *v.* KHATOONNESSA BIBEE AND OTHERS.*

1894 *Jan.* 18.

Sale by Receiver—Obstruction of Possession—Purchaser, rights of—Code of Civil Procedure (Act XIV of 1882), chapter XIX and s. 647—Practice—Costs.

Practice of the Original Side of the Court followed in recognizing the right of a purchaser at a Receiver's sale to obtain the assistance of the Court in obtaining possession under the provisions of the Code relating to sales in a suit.

UNDER an order of the High Court, dated the 29th November 1892, made with the consent of all parties, it was amongst other things ordered that the Receiver of the High Court should be at liberty to cancel a certain lease granted by him, and to re-enter and take possession of the premises comprised in the said lease, and to sell either by public auction or private contract the entire 16-annas share of the properties in his hands belonging to the estate of Shamsooddeen Nuskar, deceased, or a sufficient part thereof, or at his discretion to grant a perpetual lease of such properties for the purpose of raising Rs. 55,000 for the payment of the liabilities

* Original Civil Suit No. 247 of 1876.

1894

MINATOON-NESSA BIBEE v. KHATOON-NESSA BIBEE.

of the estate; and that in the event of a sale the conveyances were to be settled by the Registrar of the Court.

On the 16th March 1893, the Receiver called upon the parties to make over to him all the title-deeds and documents in their possession relating to the estate, and on the 10th May 1893 he cancelled the above-mentioned lease, and called upon the parties to make over possession; and subsequently advertised for sale some of the principal properties belonging to the estate.

The Receiver, although endeavouring so to do, was unable to take possession of the properties on account of the persistent opposition of the parties, and he therefore obtained an order calling on the parties to show cause why they shou'd not deliver over to him immediate possession of the properties, together with all title-deeds and collection papers. and in default thereof why they should not be committed for contempt.

On the 19th June 1893, the parties were ordered to give immediate possession of the properties and of all documents relating thereto, but it was in such order further directed that no application for the commitment of the said parties against whom the rule *nisi* had issued should be made except upon notice to them.

On the 5th July 1893, the Receiver put up to public auction six of the properties belonging to the estate, and at such sale one Nobin Chunder Gangooly became the highest bidder and was declared the purchaser of such properties at a price of Rs. 37,200. Conveyances of the said properties were duly executed in favour of the said purchaser by the Receiver and the Registrar of the Court, and the purchaser obtained from the Receiver an *amalnamah* directing the tenants to attorn, and the usual proclamations of possession were made on the land itself.

The purchaser was, however, unable to obtain possession or to collect his rents owing to obstructions raised by the tenants and the parties, and he thereupon applied to the Court and obtained a rule calling upon the parties to show cause why he as purchaser at the Receiver's sale should not be put into possession of the properties; notice was served on the parties at the same time calling upon them to show cause why they should not be committed for contempt in obstructing the Receiver's possession. The two rules came on for hearing together

Mr. *Jackson* for Ahmedullah Nuskar and others showed cause.

Mr. *Phillips* for the purchaser in support of the rule.

At the hearing, the Court decided the question of commitment in favour of the parties, and as to the right of the purchaser at the Receiver's sale to be put into possession, made the following order :—

SALE, J.—The only point remaining to be determined is as to whether in the circumstances I ought to make an order for possession to be given to the purchaser. The question depends on whether a purchaser from a Receiver is entitled to be put in the same position as a purchaser at a sale by the Registrar, or at an execution sale under the provisions of the Civil Procedure Code. A sale by the Registrar is made under an order of the Court, and is binding on all parties to the suit. So is a sale by a Receiver. In what particular, then, does it differ from a sale by the Registrar? In the case of *Chandra Nath Biswas* v. *Biswa Nath Biswas* (1) it appears that an application was made by a Receiver to compel a defaulting purchaser to come in and complete his purchase. The learned Judge (Macpherson, J.) held that the application was irregular in form and dismissed it, but in the course of his judgment he made observations which seem to show that he considered that a sale by a Receiver stood on a different footing from a sale by the Registrar. If that were so, and if a sale by a Receiver under an order of Court differs in no respect from a private sale, a purchaser at a Receiver's sale can only obtain possession adversely by a suit for possession against any person withholding possession, even though such person should be a party to the suit and bound by the order for sale, and by it concluded and estoppel from making any defence. But there are cases in this Court in which sales by a Receiver have been regarded as sales by the Court, and orders for possession have been obtained by the purchasers under the Code. In one instance where property was attached in the hands of a Receiver, the Court ordered the property to be sold by the Receiver instead of by the Sheriff, and the subsequent proceedings were precisely similar to those which take place in an

(1) 6 B., L. R., 492.

1894

MINATOON-NESSA BIBEE v. KHATOON-NESSA BIBEE.

execution sale by the Sheriff: *Pertab Chunder Johurry* v. *Bhoobun Mohun Neogy*, Suit No. 144 of 1884, order dated 30th July 1888.

In another case, a mortgage suit, the Receiver, instead of the Registrar, was ordered to sell the property comprised in the mortgage, *viz.*, a family dwelling-house in the occupation of the defendant, who was the widow and executrix of the deceased proprietor. After the sale, an order was obtained by the purchaser on notice, that a conveyance be executed by the Registrar for and in the name of the defendant, and that the Sheriff do in the manner provided for by section 318 of the Code deliver over possession to the purchaser: *Herumbo Chunder Haldar* v *Mohaluckhy Dossee*, Suit No. 100 of 1883, order dated 8th December 1888.

A similar order was made in an administration suit in which the Receiver appointed in the suit, instead of the Registrar, was directed to sell. In that case, on the application of the purchaser, an order was made confirming the sale and directing possession to be given to the purchaser. This was followed by an order directing the Sheriff to put the purchaser in possession: Suit No 27 of 1889, orders of 29th August 1889 and 22nd November 1889. In another case, an administration suit, in which property was sold by the Receiver under a decree of court, an order was made, under the provisions of the Code, for the execution of the conveyance by the parties to the suit, or, if they should fail to comply with the order, by the Registrar for them and in their names: *Broughton* v. *Ashroffooddeen Ahmed*, Suit No. 694 of 1879, order dated 12th September 1893.

In Suit No. 118 of 1884, *Roy Chund Dutt* v. *Sham Lall Soor*, a sale by a Receiver was treated as a sale by the court, and a certificate of sale was granted by an order, dated 6th May 1885.

These are unreported cases, a note of which has been furnished by the Registrar.

They show that sales by Receivers under the directions of the Court have been treated as sales by the Court. And when sales by Receivers are in all essential particulars similar to sales by the Registrar, I confess I can see no reason why they should not be treated as sales by the Court. They have not, it is true, been provided for by the rules of the Court. Being of an exceptional character, it was probably not thought necessary to provide for

them by any special rules. But if they are sales by a Civil Court in a suit, the procedure prescribed by the Code for sales in a suit would be applicable.

It should be observed that the procedure prescribed by the Code is applicable not only to a suit, but also to miscellaneous proceedings, the intention being that it should be as widely applicable as possible—see section 647 of the Code.

An important fact in the present case is that this particular sale has been already treated as a sale by the Court, the Registrar having been directed, under the provisions of the Code, to execute the conveyance on behalf of some of the parties to the suit. The practice followed in these cases shows that this Court has recognised the right of a purchaser at a Receiver's sale to invoke the assistance of the Court in obtaining possession under the provisions of the Code.

On the materials before me, it sufficiently appears that possession has not been obtained by the purchaser of all the properties purchased by him. I must, therefore, make an order for possession in his favour. This order will supersede the previous order for possession made in favour of the Receiver.

The remaining question is one of costs. The parties against whom the rule was obtained have succeeded on the main point in having the rule discharged as far as the commitment is concerned. On the other hand the purchaser is entitled to an order as to a portion of his application. Under the circumstances I should be disposed to apportion the costs if that can be done. I direct that Mr. Jackson's client shall have the costs incurred in meeting the application for commitment.

Attorneys for the Nuskars: Messrs. *Watkins & Co.*

Attorney for the purchaser: Mr. *A. Hinde.*

T. A. P.

Before Mr. Justice Sale.

1894
Feb. 19.

IN THE GOODS OF PREM CHAND MOONSHEE, DECEASED.

UPENDRA MOHAN GHOSE AND OTHERS (DEFENDANTS) *v.* GOPAL CHANDRA GHOSE AND OTHERS (PLAINTIFFS).*

Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882), ss. 568-596—Additional evidence in Appellate Court—Costs—Power of Judge sitting to hear applications for leave to appeal to Privy Council.

The test as to whether additional evidence should be received in an Appellate Court under s. 568 of the Code of Civil Procedure depends upon the question whether or no the Appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause"; as to this the Appellate Court is to be the sole judge.

The rejection of an application under that section cannot be said to involve any "substantial question of law" within the meaning of s. 596 of the Code so as to give the right to an appeal to the Privy Council.

APPLICATION on notice under s. 596 of the Civil Procedure for leave to appeal to Her Majesty in Council.

It appeared that on the 12th January 1892 Gopal Chandra Ghose, Mutty Lall Ghose and Okhoy Coomar Ghose filed a petition in the High Court in its Testamentary and Intestate Jurisdiction, praying that probate of an alleged will of one Prem Chand Moonshee, deceased, might be granted to them as executors of the alleged will, the value of the estate of the deceased being stated to be Rs. 110,339-5-9.

On the 13th January 1892 Upendra Mohan Ghose, Jogendra Nath Ghose and Nogendra Mohan Ghose entered a caveat and filed affidavits in support thereof, contending *inter alia* that the alleged will was a forgery and that they were entitled as the legal heirs of the deceased to his estate. The petition and affidavit abovementioned were under an order of Court treated as a plaint and written statement, and the application was set down as a contentious cause. On the 26th July 1892 judgment in the suit was passed by Mr. Justice Trevelyan who found *inter alia* that the will was genuine, and directed probate to issue to Mutty Lall Ghose and Okhoy Coomar Ghose, Gopal Chandra Ghose having died in the meanwhile.

* Application in Original Civil Suit No. 142 of 1892.

On the 29th August Upendra Mohan Ghose, Jogendra Nath Ghose and Nogendra Mohan Ghose preferred an appeal which came on for hearing before the Chief Justice, Mr. Justice Norris and Mr. Justice O'Kinealy, on the opening of which the appellants' Counsel stated that he should desire to make an application thereafter bearing upon the fact that the will in question was written on two pieces of cartridge paper; at the conclusion of the opening Counsel made an application to the Court supported by affidavits, praying that he might be permitted to adduce fresh evidence under s. 568 of the Code of Civil Procedure.

The respondents filed affidavits in opposition, and the application was heard, and on the 7th February 1893 was dismissed by a majority of the said learned Judges.

The appeal thereupon proceeded, and on the 22nd March 1893 was dismissed with costs.

The appellants alleging that, as regards amount or value and also as regards its nature, the case fulfilled the requirements of s. 596 of the Code, applied for leave to appeal to Her Majesty in Council against the order of the 7th February 1893, on the ground that the said order was principally based upon an erroneous assumption, that a witness whom the appellants had desired to recall had conducted the case from January to July 1892, whereas the said witness had not in fact conducted the case or taken any part in the conduct thereof at any time, and that, having regard to the facts deposed to in the said affidavits in support of the application, the Court should have granted the same and should have heard and considered the evidence proposed to be adduced before deciding the appeal, and as against the decree of the 22nd March 1893, on the ground that the will was a forgery and that the judgment was against the weight of evidence.

Mr. *Garth*, for the applicants, contended that the refusal of the application of the 7th February 1893 must be treated as a matter involving a "substantial question of law" within the meaning of s 596.

Mr. *Woodroffe* (with him Mr. *R. Mittra*) *contra*, contended that the Court was exercising a discretion in refusing the application, and that this discretion should not be interfered with, and that at all events no substantial question of law was involved in such refusal

1894

IN THE GOODS OF PREM CHAND MOONSHEE.

UPENDRA MOHAN GHOSE v. GOPAL CHANDRA GHOSE.

SALE, J.—This is an application under section 596 of the Civil Procedure Code for a certificate to enable the applicants to appeal to Her Majesty in Council. A notice under section 600 was issued to the opposite parties who have appeared and opposed the application.

The suit was brought by the respondents in the Testamentary and Intestate Jurisdiction of the Court to establish the will of Prem Chand Moonshee.

The defendants, claiming to be the heirs of Prem Chand Moonshee, impugned the genuineness of the document propounded by the plaintiffs as the will of the deceased. The learned Judge in the Original Court, in an elaborate judgment, upheld the will. An appeal was preferred by the defendants. In the result the appeal was dismissed and the judgment of the Original Court affirmed, the reasons upon which the learned Judge in the Original Court proceeded being approved and adopted by the Appellate Court.

It appears that in the course of the hearing of the appeal an application was made by the appellants, under section 568 of the Code, for leave to adduce further evidence. The application, which was supported by affidavits and was opposed on affidavits, was rejected. The point now submitted is that the refusal of the application should be treated as involving a "substantial question of law" within the meaning of section 596 of the Code.

Section 568 provides that the parties to an appeal shall not be *entitled* to adduce fresh evidence in the Appellate Court. It follows that the rejection of their application to be allowed to adduce such evidence contravened no right. It further seems that under that section the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the Appellate Court requires the evidence "*to enable it to pronounce judgment or for any other substantial cause.*" The test of the admissibility of the evidence, therefore, seems to be the requirements of the Court itself. The language of the section shows that the Appellate Court, to which the application is made, is to be the sole and final judge of the question whether circumstances

exist which require the admission of the evidence, and that the discretion vested in the Court for the purpose is not one which the Legislature intended should be subject to revision or control by a higher tribunal. Moreover, if the rejection of any such application, which as to its merits may or may not be of an entirely frivolous character, is to be held to involve a substantial question of law within the meaning of section 596, it is obvious that an opportunity would be afforded to litigants of bringing themselves within the requirements of the section in a manner and in a way hardly contemplated by the Legislature. For these reasons it appears to me that the rejection of the application did not involve any substantial question of law, and that the applicants have failed to bring themselves within the requirements of section 596. I must, therefore, refuse the application with costs.

Mr. *Mittra*.—I ask that the costs of the application be costs of the appeal. The Appellate Court required the appellants to give security for the costs of the appeal. The applicants are not men of means, and the respondents will not be able to recover their costs of this application unless the order now asked for be made.

SALE, J.—Have I the power?

Mr. *Mittra*.—I submit your Lordship has power. When an Appeal Court is not sitting, the Judge, exercising original jurisdiction, has all the powers of the Appeal Court, and in the exercise of that power your Lordship can make the order.

SALE, J.—The present application is made under the sections relating to appeals to her Majesty in Council, and cannot, I think, be treated as forming part of the Appellate proceedings in this Court. I cannot, therefore, direct the costs of this application to be included in the costs of the appeal which have been already dealt with.

Application refused.

Attorneys for the appellants:—Messrs. *Sen & Co.*

Attorney for opposing parties:—Babu *Okhoy Chunder Dutt.*

T. A. P.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Macpherson.

1894
March 16.

HALIBURTON *v.* THE ADMINISTRATOR-GENERAL OF BENGAL AND OTHERS.*

Will—Construction of Will—Joint tenancy, in fee—Life estate—Intention of testator—Restricted enjoyment, Direction as to.

A testator devised his estate, should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death her children and their descendants should take *per stirpes;* and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children, the testator's wife should take the whole estate.

The testator's wife remained his widow until her death, her children having all predeceased her without being married.

Held, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift.

SUIT for the construction of the will of Henry Adams, deceased, and for a declaration of the plaintiffs' rights thereunder.

Henry Adams, an inhabitant of Calcutta, died on the 17th May 1845, possessed of considerable property in the 24-Pergunnahs, and leaving him surviving his widow Mary Henrietta, a half-brother Frederick Broadhead, and two children by his said wife, named respectively Mary Harriet and Emily Frances; and having made his last will and testament on the 30th April 1844, the material parts whereof are as follows:—

1. "I devise my estate contained in potta No. 2 called Dampia Abad as follows:—Firstly, in the event of my wife, Mary Henrietta, remaining my widow, that the estate shall be for the general benefit of herself and my child

* Original Civil Suit No. 66 of 1893.

Mary Harriet, and any other child or children which may be born of my body through her either before or after my death, and also that my wife Mary Henrietta, should she remain my widow, shall have the full life-interest in my estate, and shall not be annoyed with any vexation about shares during her lifetime, but after her death any child or children which she may have, born of my body and who shall be surviving at the time of her death, or should any of them have been married and died leaving children lawfully begotten, shall share in this manner, *viz.*, my children male and female shall have equal shares, and in the event of the before-mentioned occurrence happening, *viz.*, any of these children dying previously to my wife Mary Henrietta, their children, if they leave any lawfully begotten, shall enjoy their parents' share (meaning that one child's share)."

2. "In the event of my wife Mary Henrietta not remaining my widow but marrying again, and my child Mary Harriet shall be living, and any other child or children which my aforesaid wife Mary Henrietta may bear of my body either before or after my death, then the estate is to be for the general benefit of my children born through her, male and female, to be entitled to equal shares when of the age allowed by law. And as I propose making my wife Mary Henrietta an executrix, her power after her second marriage shall wholly and entirely cease over this property, and that power shall solely remain with the Registrar of the Supreme Court."

3. "In the event of my child or children dying before marriage and without children and under age, and my wife Mary Henrietta should have contracted a second marriage, then I will that the aforesaid Mary Henrietta shall have one-half of my property, and Frederick Broadhead, now a Master in the Pilot Service, or in the event of his death his children lawfully begotten, who may survive, shall have the other half; and in the event of his dying without issue prior to such occurrences taking place, then my present wife the aforesaid Mary Henrietta shall have the whole."

Probate of the will was taken out by the widow and the Registrar of the Supreme Court on the 23rd May 1845.

The testator's daughters Mary Harriet and Emily Frances died on the 25th May 1846 and on the 10th February 1862, respectively, neither of them having been married.

In 1852 the potta referred to in the will was surrendered to the Government, and a fresh potta was granted to Mary Henrietta, her heirs, executors, administrators and assignees. Subsequently the property included in the potta was disposed of, and at the time of suit stood represented by a sum of Rs. 1,30,000 in the hands of the Administrator-General of Bengal.

Frederick Broadhead, the half-brother of the testator, died in the year 1846, having on the 29th June 1844 made and published

1894

HALIBURTON v. THE ADMINISTRATOR-GENERAL OF BENGAL.

his last will, whereof he appointed his widow Mary Sophia (who had been his second wife, and who at the time of suit had intermarried with one J. S. Sherman,) executrix, and leaving him surviving by her two sons Juba Theodore Broadhead and Edward Harriss Broadhead, and by his first wife a daughter named Eleanor, who was living at the date of suit and who had issue, a daughter and two sons, one of whom and the daughter were also said to be alive at the time of suit.

Juba Theodore died on the 6th November 1891, and on the 21st January 1892 the Administrator-General obtained letters of administration to the estate.

Mary Henrietta died in England on the 14th April 1892, without having intermarried with any person after the death of the testator, and having made her last will, whereby she disposed of all property of which she died possessed or entitled to, to one Arthur Lawrence Haliburton, the plaintiff in this suit.

The suit was one on the Original side of the Court, a special Bench of two Judges having been appointed for the hearing. The question arising in it was what was the nature of the estate given to Mary Henrietta by the first 3 paragraphs of the will of Henry Adams, the plaintiff claiming that upon its true construction the sum of Rs. 1,30,000 formed part of the estate of the said Mary Henrietta Adams at the time of her death, and that by her will she had disposed of the same in his favour.

The *Advocate-General* (Sir *Charles Paul*) and Mr. *O'Kinealy* for the plaintiff.

Mr. *Phillips* and Mr. *Graham* for the Administrator-General as representing the estate of Juba Broadhead.

Mr. *Pugh* for E. H. Broadhead.

Mr. *Henderson* and Mr. *Peacock* for the Administrator-General as representing the estate of the testator.

Mr. *Evans Pugh* for Mrs. Sherman.

Mr. *O'Kinealy*.—It is the case of all parties that the pottas formed part of the estate of Henry Adams after they were renewed. The first part of paragraph 1 of the will gives an estate to his widow and children as joint tenants, and widow takes by survivorship. The second part of that paragraph is said to cut

down the first part, but by that part he merely intended that his widow should not be bothered with shares and accounts. He did not thereby intend to exclude the children; it merely provides for the administration and management of the estate during her lifetime. If it meant a life estate only to the widow, it excludes the children during her lifetime; the testator intended that if the children should survive, they should take, but if the widow should survive the children, she should take. By the 2nd paragraph if the widow re-marries during the lifetime of his children and their issue she is to get nothing at all, but by the 3rd paragraph if she survived the children and their issue and married again she was to get half, or the whole if she survived the half-brother. I submit that the first clause of paragraph 1 is sufficient to dispose of the absolute interest in favour of the widow and children as joint tenants and to prevent an intestacy in every event not expressly provided for by the superadded provisions depending upon particular contingencies, and consequently as she has not re-married she is entitled to the whole estate by reason of her having survived her children; this construction is confirmed by the use of the words "and also," which introduces the clauses of modification, and by the fact that the testator provides for no other contingency but her re-marriage, and even in that event she is to take half the estate; it cannot be supposed he intended she should take more, if she married again, when there were no issue, than she would if she remained his widow. I submit the words "and also" mean that the previous gift is to stand.

The construction contended for has been put upon similar wills, *Whittell* v. *Dudin* (1) where the introductory words are "subject nevertheless;" in the present case the words are "and also," as though the testator contemplated hardly making a difference with the clause before them. See also *Mayer* v. *Townsend* (2), *Winckworth* v. *Winckworth* (3), *Hulme* v. *Hulme* (4), *Campbell* v. *Brownrigg* (5), *Lassence* v. *Tierney* (6).

Mr. *Phillips* for the Administrator-General.—The will is not expressed with exactitude. Provision is not made for every

(1) 2 J. & W., 279.
(2) 3 Beav., 443.
(3) 8 Beav., 576.
(4) 9 Sim., 644.
(5) 1 Phill, 361.
(6) 1 M. & G., 551.

1894

HALIBURTON v. THE ADMINISTRATOR-GENERAL OF BENGAL

contingency that might take place. If the will is to be construed as the other side suggest, the widow would have a preference to the half-brother. The widow has a full life interest, and nothing more. The words "general benefit" mean nothing more than "as I am about to describe"; the words "and also" are merely equivalent to the word "namely." Even if all the children died, what is there to give the widow a larger estate? The interest given her cannot be a joint tenancy in fee with the children, because each of them might have severed their shares, and in such case the widow would have been "annoyed about shares." I submit the widow has an estate for life with remainder to the children; the testator has not provided for all his children not dying in the lifetime of the widow and his widow not re-marrying; he did not contemplate his children would die before his wife in the early part of the will. In the 3rd paragraph, he did not contemplate the death, but the re-marriage, of the widow. There is no more reason for supposing that the widow had the whole of the estate before the devise given by the 3rd paragraph than there is for considering that the half-brother had the whole in him. The 3rd paragraph merely puts the wife and half-brother on an equality. There is nothing in 2nd and 3rd paragraphs inconsistent with the wife having a life interest only. Nor is there anything to guide us as to the intention of the testator in the events which have happened. The rule as to avoiding intestacy does not mean that you are to introduce a new disposition which goes beyond the testator's disposition, but the meaning of the rule is that testacy is only preferred to intestacy when there are two doubtful constructions to be put on a will, and in no case could it be applied in determining whether the testator meant to give his property to his wife or to his half-brother. *Lett* v. *Randall* (1) is the case as to this rule.

Here there is no doubt as to the words of the disposition, and there is no such gift to the widow solely as would give rise to rival constructions; there is a direct gift to wife for life and remainder to children. The gift to the children's children in the 1st paragraph is fatal to the contention that the widow and children took a joint estate in fee. Nor does the 3rd paragraph

(1) 10 Sim., 112.

favour the view that she had the full estate given her by the 1st paragraph. The only case in which the widow is to take the whole estate is that under paragraph 3. In *Newill* v. *Newill* (1) the words "for use and benefit" of wife and children are used, and it was held that the wife and children took as joint tenants, but Lord Hatherley laid it down that although the ordinary construction of a gift to a wife and children would give a joint tenancy, yet if there is anything in the will which can indicate a different intention it must be followed. One of such indications is when the children are to take shares in the fund or when the fund is secured. Here the will gives indications that a joint tenancy was not intended. The cases cited by the other side do not apply. They are all cases in which it was found that the testator wanted to separate a fund or share from his estate, something to go out, and not come back. In the present case the words referring to the children's shares and the gift to children's children would have to be cut out, if the 1st paragraph gives a joint tenancy in fee. The gift to the widow and children was not a gift for the benefit of the widow; the children would appeal to the testator most, as shown by the clause as to wife's re-marriage. The cases cited by the other side assist me so far as to there being a direct gift to the children; and early vesting is favoured; these interests were to be vested at latest at marriage or majority, and all the subsequent provisions are for the enjoyment of the shares. I submit the will gives a direct gift to the wife of a full life interest with a remainder to the children as tenants in common. There was an immediate vesting in the child that was alive at the time.

It is impossible for a man to give a joint tenancy in fee and to say that there is to be no vexation about shares, as this would be contradictory, but it is possible if a life interest only is given. I submit there is no intestacy, and the widow took only a life estate. The expression regarding age refers not to vesting, but to enjoyment. The cases on this subject are all collected in 2 Jarman on Wills, 5th Ed., 1239.

Mr. *Pugh* for E. H. Broadhead.—*Newill* v. *Newill* (1) shows that where there is an indication of an intention to give a widow an

(1) L. R., 7 Ch., 253.

1894

HALIBURTON v. THE ADMINISTRATOR-GENERAL OF BENGAL.

estate for life, the Court will not on a gift to her and her children give more to her than a gift for life. *Dungannon* v. *Smith* (1) shows how wills of this description should be construed. A joint tenancy is no more favoured by law than an intestacy; it cannot be invoked if the context shows it was not intended. The gift here is one to the widow for life only. The cases cited for the plaintiff are gifts of funds separated, gifts to individuals, not to a class, as in this case. As to the alleged ultimate remainder to widow, see *Lassence* v. *Tierney* (2), *Joslin* v. *Hammond* (3), *In re Richards* (4), and *Houghton* v. *Brown* (5).

Mr. *O'Kinealy* in reply.

The Court (PETHERAM, C.J., and MACPHERSON, J.) delivered the following judgments:—

PETHERAM, C.J.—The plaintiff is one of the executors of Mary Henrietta Adams, who died in the month of April 1892; the defendants are the Administrator-General of Bengal and the surviving relatives of Henry Adams, who died in 1845, and who was the husband of Mary Henrietta Adams; and the action is brought to construe the will of Henry Adams, and to obtain possession of his estate from the Administrator-General, on the ground that in the events which have happened the whole of his estate became the absolute property of his widow, and passed by her will to the plaintiff, who is her executor and the residuary devisee under her will.

Henry Adams made his will on the 30th of April 1844, and died on the 17th of May 1845, leaving a widow and two infant daughters, both of whom died infants and unmarried, the first on the 25th of June 1846, the second on the 10th of February 1862. The widow lived until the 14th of April 1892, but never married again.

The will of Henry Adams provides for three events. First, that of his wife remaining his widow; second, that of her marrying again and his children being alive; and third, that of her marrying again and his children being dead. The event which did happen

(1) 12 Cl. & Fin., 546.
(2) 1 M. & G., 551.
(3) 3 My. & K., 110.
(4) 50 L. T., 22.
(5) 53 L. J. Ch. (N. S.), 1018.

was the first, *i.e.*, his wife remained his widow until her death; but in order to ascertain what was the intention of the testator in this event we must look at the whole will.

The will commences:—I devise my estate, &c., as follows:—

First, in the event of my wife "Mary Henrietta remaining my widow, that the estate shall be for the general benefit of herself and my child Mary Harriet, and any other child or children which may be born of my body through her, either before or after my death." It then goes on to provide that the testator's wife, should she remain his widow, shall have the full life-interest, and shall not be annoyed with any vexation about shares during her life-time, but that after her death his children and their descendants shall take the estate between them *per stirpes*. The question is whether this was an absolute gift of the estate to the widow and children jointly, with restrictions as to their mode of enjoyment of the gift, in which case the widow not having married, and having survived her children, all of whom died unmarried, took the whole estate, and it passed by her will to the plaintiff, or whether it was a gift of a life estate only to the widow, with remainder to her children and their descendants, in which case in the events which have happened the whole estate has not been disposed of by the will, the estate on the death of the widow passed to the heir-at-law of Henry Adams, and the suit must fail: *Lassence* v. *Tierney* (1). If we look at the portion of the will which I have already quoted above, it may no doubt be contended with much force that it indicates no intention on the part of the testator that his widow should take more than a life-estate, and that he was not when he wrote this portion of his will contemplating the extinction of his own descendants in the life-time of his widow; but when we look at the subsequent provisions of the will, and as I have said before we must look at it all to ascertain what his intentions were, it is, I think, apparent that he did contemplate the extinction of his descendants in her life-time, and did intend that in that event she should take more than a life-interest in his estate. The third event for which he provides is that of his widow having re-married and her children being all dead, and in

(1) 1 M. & G. 551.

1894

HALIBURTON v. THE ADMINISTRATOR-GENERAL OF BENGAL.

that case he gives half the ultimate interest in his estate to his half-brother Frederick Broadhead, and his children, and the other half to his wife, and if his half-brother is dead without issue, he gives the whole to his wife. It is, I think, impossible to suppose that he intended to give the ultimate estate to his widow if she married again and to deprive her of it if she remained his widow, and consequently I think that, reading the will altogether, it appears that it was his intention by the first devise to give the estate to his wife and children jointly, and that what follows was merely intended to restrict the mode in which they should enjoy it.

For these reasons I am of opinion that the plaintiff's suit must be decreed, but as the meaning of the will is obscure the costs of all parties, including costs of applications which have been reserved, should be paid out of the estate.

MACPHERSON, J.—I agree as to the construction of the will. The Administrator-General as representing the estate of Henry Adams will get his costs out of the estate as between attorney and client.

Attorneys for plaintiffs: Messrs. *Sanderson & Co.*

Attorney for Mr. Sherman: Mr. *A. E. Harris.*

Attorneys for the Administrator-General: Messrs. *Morgan & Co.*

T. A. P.

PRIVY COUNCIL.

*P. C.**
1893
Nov. 15,
Dec. 9.

ABDUL WAHID KHAN (DEFENDANT) *v.* SHALUKA BIBI AND OTHERS (PLAINTIFFS).*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Pre-emption—Pre-emption among co-sharers under the Oudh Laws Act, (XVIII of 1876), *ss.* 9 *to* 13—*Pre-emptor's right, as such, dependent on the intending vendor's right to sell—Accounts between co-sharers—Contribution, right to, for expenses of suit.*

Pre-emption, as declared in the Oudh Laws Act, 1876, is not applicable where the co-sharer claiming it denies the title of the co-sharer proposing

* *Present:*—LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.

to sell, alleges that the latter is not a co-sharer, and says that he himself is entitled to the property.

One of two co-sharers, entitled to equal shares in an inheritance, having taken possession of the whole, was sued by the other for her share, with mesne profits from the date of the suit. To provide costs, the latter had sold to her co-plaintiffs the right to claim half of her share. The defences were—(1) relinquishment of her claim in favour of the defendant; (2) that the defendant had a right of pre-emption as to part, in consequence of the above transaction; (3) that the share in dispute was subject to a proportion of the debts due from the estate of the deceased, chargeable on the whole inheritance; and that if the plaintiffs should be held to be entitled to a decree, they should also be declared liable to pay, according to shares, their part of all the debts of the deceased liquidated by the defendant, as well as a proportion of money which he had expended, in good faith, in litigation for the protection of the inheritance.

As to (1), the two Courts below concurred in the finding that no relinquishment had taken place. As to (2), it was pointed out that there had been no attempt to sell a share of the inheritance, but only to sell a share in a suit; and it was *held*, that the position taken up by the defendant was inconsistent with his claiming to pre empt, so that pre-emption was inapplicable. As to (3), it was *held*, that, although the plaintiffs could not have a decree for mesne profits during the whole period of the defendant's possession, yet, if any account was to be taken of the defendant's payments, it must also be taken of his receipts; and it was held that the incidental benefit to the plaintiffs, who had not authorized the litigation, in which expense had been incurred, did not give rise to any implied contract on their part, or render them liable in equity for any portion of that expense.

APPEAL from a decree (27th June 1889) of the Judicial Commissioner, affirming a decree (29th March 1888) of the District Judge of Rae Bareli.

The questions now raised related to the right of a sharer in an inheritance to pre-emption upon an alleged sale of half the share of the person claiming to be co-sharer with him; and related to the liabilities of the claimants, in respect of debts said to be a charge on the share claimed in the inherited property.

The principal plaintiff, Shaluka Bibi, claimed (16th September 1886) an eight-annas share in *taluka* Andari Serai and villages in the Saloni *tehsil*, district Rae Bareli, valued at Rs. 22,753, which had belonged to Muradi Bibi, who died on the 10th January 1881. She was the wife of Abdul Wahid Khan, the defendant, who now appealed, between whom and the principal plaintiff, the

1893

ABDUL WAHID KHAN v. SHALUKA BIBI.

mother of the deceased Muradi, the contest was as to the moiety of the estate of the latter, heritable, according to Mahomedan law, by Shaluka as mother, the other moiety going to Wahid Ali Khan, the husband. It arose out of the latter's having taken possession of the whole inheritance. With the plaintiff, Shaluka, were joined three co-plaintiffs her brothers, in whose favour she had executed a deed purporting to convey a half share of her right in the estate of Muradi, for the sum of Rs. 10,000.

Abdul Wahid, the defendant, set up a "*baz-dawa*," or deed of relinquishment of claim, dated 1st February 1881; and alleged that Shaluka had executed it in his favour, on his giving her a "*guzaranama*" of the same date, granting her Rs. 50 a month for her life. Shaluka denied having entered into any such agreement, or having executed the deed. Abdul Wahid also made an alternative defence, that, in consequence of the transaction between Shaluka and her brothers, his right to pre-empt the one-fourth conveyed by her to them, had arisen, being conditional on payment of Rs. 10,000 by him. Another contention by the defendant was that all debts, whether secured by hypothecation of property, or not, that were due from Muradi Bibi in her lifetime must have precedence over the plaintiff Shaluka's claim to inherit her property, and must be paid out of her share as well as out of the defendant's share. Other sums were claimed from the plaintiffs by the defendant, who alleged that he had expended money in good faith in litigation for the protection of the property. Of these, the largest sum had been expended by him in obtaining, by an appeal to Her Majesty in Council, a reversal of a decision adverse to the estate of Muradi Bibi. This appeal was *Wahid Ali* v. *Nuran* (1).

Both the Courts below concurred in finding that the alleged relinquishment, or *baz-dawa*, had not been executed by the plaintiff Shaluka. No question as to those findings upon evidence was raised on this appeal, which was directed at the decisions below on the other defences.

The District Judge was of opinion that no decree for pre-emption could be given. That right only arose when the pre-emptor acknowledged the right on the part of the vendor intending

(1) I. L. R., 11 Calc., 597; L. R., 12 I. A., 91.

to sell except so far as it was controlled by his (the pre-emptor's) right; whereas here the defendant denied that the plaintiffs had any title. He was also of opinion, on going through the items debited to Shaluka by the defendant, and referring to the sum claimed by him in respect of the appeal, that nothing was due from the plaintiffs. The debts of Muradi might have been paid from the profits of the estate in the hands of the defendant, having been more than covered by his receipts. Possession was accordingly decreed to the plaintiffs without being made contingent on their paying any money to the defendant.

On an appeal, the Judicial Commissioner affirmed the judgment of the District Judge considering that a claim to pre-emption could not be decreed in a suit where the fact of a good sale, the basis of the claim, was denied.

On the defendant's appeal,

Mr. *Herbert Cowell* and Mr. *J. H. A. Arathoon* (Mr. *T. H. Cowie*, Q.C., with them) appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* for the respondents.

For the appellant Mr. *H. Cowell* argued that the Courts below had been wrong in disallowing the defendant's right of pre-emption under Act XVIII of 1876, sections 9 to 13. He referred to *Asgur Mahomed* v. *Nuzeema Bibee* (1), where a plaintiff, claiming pre-emption, had failed to assert the right in a suit in which the purchaser of the land had obtained a decree, and it was therefore held that no fresh suit would lie to enforce his claim to pre-empt. The right of possession was well founded on a right of pre-emption, and should be held to be a good defence to a suit for the proprietory right. It was none the less a defence because it was an alternative one set up along with a claim made by title superior to that of the vendor. The latter claim might fail, and yet the right to pre-empt would subsist. With regard also to section 13, explanation 2, of the Civil Procedure, the question of the right to pre-empt ought to be raised in the same suit as that in which title was claimed, or else the claimant would be taken to have abandoned it. The exact right was that on paying Rs. 10,000, the price fixed as the value of the half share, the appellant should have his

(1) 14 W. R., 272.

1893

ABDUL WAHID KHAN v. SHALUKA BIBI.

name substituted for those of the co-respondents, who were joined with Shaluka as co-plaintiffs. As to the accounts it was argued that it was important, in this appeal, that the suit was only for mesne profits accrued after its institution. Yet, for the Court to have fixed a certain amount as having been paid by the defendant in discharge of Muradi's debts, and to have ascertained a certain amount of the income prior to the suit, and to have fixed that amount as balancing all claims against the plaintiffs in respect of Shaluka's share, was an indirect mode of giving mesne profits accrued prior to the suit. In so far as it had this result, the decree below was erroneous. It was also contended that the respondents should have been held liable to contribute one-half of the expenses *bonâ fide* incurred in protecting the estate of Muradi Bibi, including those which had taken the form of the costs of Abdul Wahid's appeal against Nuran (1) which had succeeded. The right to recover a proportion of such costs in respect of Shaluka's share resembled the right of a person who had preserved the property of another at his own expense, or by his own exertions. Reference was made to *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2), and the *Peruvian Guano Company* v. *Dreyfus Brothers* (3).

Mr. *J. H. A. Arathoon* on the same side. The suit not having been brought within three years from the time when the existence of the false *baz-dawa* had become known to Shaluka was barred by art. 92, sched. II, Limitation Act, XV of 1877. He referred to *Janki Kunwar* v. *Ajit Singh* (4) as to "knowledge" within art. 92.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* for the respondents were not called upon.

Afterwards, on the 4th December 1893, their Lordships' judgment was delivered by

SIR R. COUCH.—The suit in this appeal was brought against Abdul Wahid Khan for possession of a half share of property left by Muradi Bibi deceased. She was the daughter of Shaluka Bibi and the wife of Abdul Wahid, and died on the 10th January

(1) I. L. R., 11 Calc., 697; L. R., 12 I. A., 91.
(2) I. L. R., 21 Calc., 142; L. R., 20 I. A., 160.
(3) L. R. [1892] A. C. 166.
(4) I. L. R., 15 Calc. 58; L. R., 14 I. A., 149.

1881 leaving them her only heirs. On her death Abdul Wahid took possession of all the property left by her. These facts were not denied by Abdul Wahid. His first ground of defence was that Shaluka Bibi by a deed dated the 1st of February 1881, in consideration of a maintenance of Rs. 50 a month during her lifetime, withdrew her claim to any right and interest in the estate of Muradi Bibi; and the first issue in the suit was, whether this deed was executed by Shaluka Bibi. It has been found by the lower Courts that it was not, and this ground of defence is therefore disposed of.

BENGAL SECRETARIAT LIBRARY

Another defence as to part of the property claimed was founded on a right of pre-emption in the defendant. On the 26th January 1886, Shaluka Bibi executed a deed in which it stated that Abdul Wahid had taken possession of the whole of the property left by Muradi Bibi, and that Shaluka Bibi could not raise funds to defray the costs of litigation and personal expenses, and that Niamat Khan, Ramzan Khan, and Wazir Khan, her brothers and legal heirs, had consented to arrange for payment of all costs of litigation and her personal expenses, on condition that whatever she obtained by way of inheritance and as dower (meaning dower due from Abdul Wahid to Muradi Bibi) should be shared and possessed with them, and that she should join them in the suit against Abdul Wahid. The deed, after providing against any compromise of the suit without the consent of the brothers, and agreeing to the aforesaid terms, concluded thus: "Let it also be known that Niamat Khan, Ramzan Khan, and Wazir Khan shall hold themselves responsible for all costs of suit and my maintenance, and that the said costs of the suit and the said maintenance, of the executant, which will be incurred from the Court of first instance to that of the last resort, will be consideration for the transfer made by virtue of this deed, which is and will be binding upon the executant. Approximate value of the property and the dower, &c., to the extent of a moiety thereof is and will be Rs. 10,000." The three brothers were joined as plaintiffs in the suit with Shaluka Bibi. The defendant in his written statement alleged that the sale-deed was invalid, because by the deed of the 1st February 1881 Shaluka Bibi had no longer any power of alienation, and if she had, the defendant had a right of pre-emption in respect of the property, and

1893

ABDUL WAHID KHAN v. SHALUKA BIBI.

that no notice as required by law was issued. He claimed that upon payment of Rs. 10,000, the price entered in the sale-deed, the suit should be dismissed. It is an error to treat the Rs. 10,000 as the price; it is given as the value of the property sold, apparently for the purpose of stamp duty. The price is really what would be incurred for costs, the amount of which was uncertain and would depend upon the resistance which the defendant made in the suit.

The law of pre-emption in Oudh is in "The Oudh Laws Act, 1876." By section 9 the defendant as a co-sharer with Shaluka Bibi was entitled to a right of pre-emption. Section 10 enacts that when any person proposes to sell any property in respect of which any person has a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell it. Section 11 enacts that any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right unless within three months from the date of such notice he or his agent pays or tenders the price aforesaid to the person proposing to sell. By section 13 any person entitled to a right of pre-emption may bring a suit to enforce it, on the ground that no due notice was given, or that tender was made and refused, or in the case of a sale, that the price stated in the notice was not fixed in good faith. This law is not applicable where the person who would be entitled to pre-emption denies the title of the person who proposes to sell, and alleges that they are not co-sharers and that he is entitled to the whole of the property. The defendant, by setting up the deed of 1881, did this. He being in possession of the property, Shaluka Bibi was obliged to raise money to defray the costs of a suit to recover her share, which she did in the usual and probably the only way available in such cases. The consideration was, the providing the money necessary for carrying on the suit, the amount of which could not be estimated. If the defendant succeeded and the suit was dismissed there would have been no property to be sold. In truth the transaction was a sale of a share in a law suit. The position taken up by the defendant was altogether inconsistent with claiming a right of pre-emption.

The defendant also claimed that if the plaintiffs should be held to be entitled to a decree they should also be declared liable to pay according to shares all the debts of Muradi Bibi liquidated by the

defendant, as well as all sums of money which the defendant expended in good faith in prosecuting suits instituted for protecting the property. The District Judge found that of eleven debts due from Muradi Bibi in a list given by the defendant, amounting to Rs. 43,956-5-4, six remained due which the plaintiffs would have to pay in proportion to their share. Muradi Bibi died on the 10th January 1881. The suit was brought on the 16th September 1886. The defendant had therefore been in possession and receiving the mesne profits for upwards of five and-a-half years. The plaint only claimed mesne profits accrued during the pendency of the suit till the date of obtaining possession. The defendant alleged that he had paid the remaining five debts, and he contended that the mesne profits before the suit not being claimed in the plaint, he was entitled to keep them and also to receive what he had paid in discharge of the debts. The District Judge rightly refused to allow this, and the Judicial Commissioner on appeal affirmed this decision. It is true that the plaintiffs could not claim to have a decree for those mesne profits, but if an account was to be taken of the defendant's payments it must also be taken of his receipts. Apparently his receipts from the plaintiffs' share of the property were much more than sufficient to satisfy the debts.

The remaining question relates to the money expended by the defendant in prosecuting suits for, as he describes them, protecting the property. The particulars of these expenses are given in a list B in his written statement. A suit had been brought in Muradi Bibi's lifetime against her for a share in the entire estate held by her, and on her death the defendant and Shaluka Bibi were made defendants in it as her representatives. The plaintiffs in that suit obtained a decree in the Court of the Judicial Commissioner in their favour. The defendant first applied to the Judicial Commissioner for a review. He was unsuccessful in that application, and he then appealed to Her Majesty in Council. He succeeded in this appeal, and the decree of the Judicial Commissioner was reversed. There were also suits for mesne profits defended by him which failed in consequence of this reversal. The list B is composed of the costs of these suits and interest on money borrowed to pay them. Shaluka Bibi took no part in these proceedings,

1893

ABDUL WAHID KHAN v. SHALUKA BIBI.

having, up to the making of the decree of the Judicial Commissioner, appeared in the suit and defended separately. In the present appeal the defendant claimed to be allowed a proportion of those costs, on the ground that the plaintiffs had got the benefit of the reversal of the decree of the Judicial Commissioner. This is not a ground for making the plaintiffs liable for any portion of those costs. The proceedings were taken by the defendant for his own benefit, and without any authority express or implied from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs. This claim has been disallowed by the lower Courts, and their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and to dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Walker & Rowe.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

P.C.*
1893
Nov. 21
&
Dec. 9.

LUKHI NARAIN JAGADEB (PLAINTIFF) *v.* JODU NATH DEO AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Second appeal—Grounds of appeal—Civil Procedure Code (Act XIV of 1882), section 584—Evidence in cases of disputed boundary—Onus of proof.

The Court of first instance accepted as correct a boundary line mapped by an Amin, dividing the estates of the opposite parties. The Lower Appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return, which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and reversed the judgment of the Court below.

Held, that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect, within the meaning of section 584 of the Civil Procedure Code, which contained the only grounds of second appeal.

* *Present:* LORDS WATSON, HOBHOUSE, and SHAND, and SIR R. COUCH.

On questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the Court in ascertaining the true line.

APPEAL, by special leave, from a decree (7th June 1888) of the High Court reversing a decree (2nd September 1886) of the District Judge of Cuttack, who had affirmed a decree (3rd March 1885) of the Subordinate Judge of the same district.

The principal question here was whether the High Court had acted beyond its powers, in hearing an appeal from the decision of a Lower Appellate Court upon an issue of fact only, without there having been any such grounds of second appeal as are stated in section 584 of the Civil Procedure Code.

On the 29th March 1877 the appellant's vendor instituted this suit, and the appellant was substituted for him on the 8th February 1884, the claim being to recover possession of an area of about eighty acres, valued, for the purposes of suit, at Rs. 2,816. The issue was whether the land was comprised in the plaintiff's *mouza* Argal, or in the defendant's *mouza* Dimripal, the latter lying eastward of the former.

An Amin deputed by the Subordinate Judge drew on his map a line running through the land in dispute as the boundary between Argal and Dimripal. This the Court found to be correct enough for the purposes of its decision, although the Amin had only made such a survey as his compass enabled him to make, without having, as he said, instruments for scientific measurement. From the decree of the first Court the defendant appealed, and the plaintiff cross-appealed to the District Judge, who accepted the Amin's report; but only after remanding the suit for a second local investigation. The second report by the Amin differed materially from the first.

The District Judge in affirming the decree observed as follows in reference to the defendant's objections to the Amin's mode of working :—

"I do not find that anything was said whilst the Amin's work was going on. The defendant chose to assume an attitude of indifference at that time;

1893

LUKHI NARAIN JAGADEB v. JODU NATH DEO.

yet if wrong trijunctional points were being adopted as the basis of the work, it was open to him to try to get right ones adopted. To do nothing until the work is over, and to rely merely upon what may be the effect of cross-examination of the Amin, is not the way to promote the expeditious settlement of the case, a thing which those who are in the right are usually more anxious for than those who are in the wrong. What the defendant here did, was to say nothing in any proper manner whilst the work was going on; but sixteen days after the Amin had submitted his report, he prayed that he might be summoned for examination, and that certain other witnesses might be also called to controvert his results."

The District Judge continued thus :—

"It is greatly to be regretted that such a point as what meridian was employed in the revenue survey should have been assumed instead of being ascertained. From the enquiries made by me it has been shown that the meridian used was not the magnetic but the true meridian, the difference between which has been also ascertained to be about 2 degrees, 50 minutes. This, of course, has had the effect of dislocating the boundary to some extent. Even if the Amin got his starting-point right, this would throw the line to one side. In order to form some opinion as to what the difference would be in the run of the boundary if the necessary allowance for the variation of the compass be made, the Amin was made to re-trace the boundary on his map with corrected bearings, the result being to make matters much more against the respondent, plaintiff, than they were before, as none of the disputed land with this alteration falls in Argal, and a good deal of admitted Argal land will fall in Dimripal. It is not open to me to order that this amendment be made the basis of final settlement. The appellant cannot, indeed, ask me to do this, for his view is that a wrong starting-point was taken, and this is really what I have to consider now. Can the appellant claim to have the work done over again? Or should matters be left as they are? As it is, a line has been made which will at all events tend to stop litigation, and gives a proportion of the disputed land to each party.

"On this matter I am not disposed to think that any further working at the case is likely to be anything but an unfructuous expenditure of time and a protraction of the dispute. The appellant who moves the Court has made no offer to place at the disposal of an Amin the instrument, without which he says himself, the boundary cannot be properly re-traced. There is no theodolite at the disposal of the Court, nor have I any means of obtaining one. Valuable instruments like these are not to be had on loan. I am thus of opinion that what has been done the defendant is not entitled now to undo. This disposes of the defendant's appeal, which is dismissed with costs."

The plaintiff's cross-appeal was also dismissed. An appeal by the defendant to the High Court, and a cross-appeal by the plaintiff followed.

The order of the High Court of the 13th June 1887 was as follows :—

"We think it necessary that the appeal should be re-heard upon the whole evidence ; but looking to the fact that the suit has now been for more than ten years pending since its institution, it having been already the subject of second appeal in the year 1882, we think that the proper course is to call up the case as a regular appeal, before ourselves, and go through the evidence and come to the best decision we can."

Afterwards, on the 7th June 1888, the High Court, having heard the appeal, gave the following judgment :—

"The facts, so far as they are necessary for the purpose of our judgment, appear to be these :—The Civil Court Amin was furnished with two maps, a survey map of *mouza* Argal and a survey map of *mouza* Dimripal, and with these two maps he was directed to go to the locality and trace upon a map prepared by himself a boundary line, showing in which of the two *mouzas*, Argal and Dimripal, the land in dispute falls. He proceeded to do what he was told, and prepared a map showing that about half of the disputed land fell in one *mouza* and the remainder in the other; and he has delineated his boundary line by a black wavy line upon his map. Subsequently it was found that this boundary of his was an erroneous one; and it was alleged that he had overlooked the fact that the meridian laid down in the survey maps with which he had been furnished showed the true meridian and not the magnetic meridian. An application was then made for a re-survey, and, as we gather from the facts, we find that, by consent of both parties, the District Judge wrote to the Survey Office to ascertain whether the meridian laid down in the survey maps was the true meridian, or the magnetic meridian, and what the variation between the meridians was. The survey authorities wrote back to say that the true meridian was shown in the survey maps, and that they had no means available in the office of answering as to what the variation was between the true and the magnetic meridian. Then, as appears from the order-sheet, the Judge communicated with the Executive Engineer of the district, asking him to say what, at that time, was the variation between the two meridians; and this reference, we find, was, as a matter of fact, made with the consent of both parties. The Executive Engineer replied that the difference was 2 degrees 50 minutes, and with this information the Civil Court Amin was directed to re-trace the boundary on the map he had prepared. This he has done, delineating the boundary by a wavy dotted green line upon his map. The result is, that the whole of the disputed

1893

LUKHI NARAIN JAGADEB v. JODU NATH DEO.

land is found to be within the defendant's *mouza* Dimripal, except a very small triangular portion at the north, the area of which is found to be 2·08 acres.

"We are of opinion that this re-tracing of the Amin ought to be accepted as correct, and that all that the plaintiffs are entitled to in this suit is the small triangular piece of land delineated which is found by the Amin to be 2·08 acres in area."

The plaintiff, on the 30th August 1888, on the ground that he had not consented to abide by the reply as to the variation of the true and magnetic meridians, applied for a review of the judgment of the High Court. This was refused.

On the plaintiff's appeal, for which special leave was given by an order in Council of the 15th August, 1890.

Mr. *C. W. Arathoon* argued that the High Court acted without jurisdiction in calling up the case as a regular appeal, and in deciding, upon the evidence, the question of fact as to the dividing line. The decision of the District Judge was final as to fact. No second appeal could be preferred except on the ground specified in section 584 of the Civil Procedure Code, and there was no error, such as was there mentioned, in the disregard of the Amin's second report by the Lower Appellate Court. He referred to *Durga Chowdhrani v. Jewahir Singh Chowdhri* (1), and to *Ramratan Sukal v. Nandu* (2). The Lower Appellate Court had decided judicially to disregard the second report of the Amin, preferring his previous report. There was no evidence upon the record of any agreement as to the meridianal line.

Mr. *R. V. Doyne*, and Mr. *F. W. Cave*, for the respondent, the Maharaja Jodu Nath Deo, submitted that the High Court had jurisdiction to make the order of the 13th June 1887. They referred to the superintending power of the High Court in virtue of the enactment in 24 and 25 Vic., c. 104, section 15. That order was made in accordance with the present appellant's interests, as presented in his cross-appeal to the High Court, where the proceeding was not objected to. But, supposing the order of 13th June 1887 to have been irregular, and so far wrong, the ultimate decree dismissing the suit was, upon the whole, in

(1) I. L. R., 18 Calc., 23; L. R., 17 I. A., 122.
(2) I. L. R., 19 Calc. 249; L. R., 19 I. A., 1.

accordance with the merits; so that it might now be held, as a second appeal, to have come under the provisions of section 584 of the Civil Procedure Code. That there had been misdecision on the merits was apparent, when the dividing line was demonstrated to be wrong by the true direction towards the north having been ascertained. It had been decided that there might be error in drawing conclusions upon evidence, which would fall within the former law of special appeal, and under the present law, under section 584. Reference was made to *Surnomoyee* v. *Luchmeeput Doogur* (1), where it was affirmed that in deciding upon questions of fact if a Court did not deal rightly with presumptions, it was an error which the High Court could, in special appeal, correct; *Ramratan Sukal* v. *Nandu* (2); *Ramgopal* v. *Shumskaton* (3), as to error in drawing conclusions.

Mr. *C. W. Arathoon* was not called upon to reply.

Afterwards, on the 9th December 1893, their Lordships' judgment was delivered by

LORD WATSON.—The deceased Maharaja Pudmalabh Deo was zemindar of two *mouzas*, Argal and Dimripal, in the district of Cuttack, which were separated by a mutual boundary running from north to south, Argal being on the west and Dimripal on the east of the line. In the year 1868, his interest in *mouza* Argal was sold in execution of a decree, and was purchased by one Babu Kanhia Lal Pundit, who instituted the present suit. On the death of the Maharaja he was succeeded by his son Jadu Nath Deo, who is the respondent in this appeal; and, on the death of Kanhia Lal, his interest in *mouza* Argal and in this suit passed to one Ram Gobind Jagadeb, and on his decease was acquired by the present appellant.

The action was brought, in March 1877, before the Subordinate Judge of Cuttack, for a declaration that a strip of ground, about 80 acres in extent, lying on the eastern verge of Argal, formed part of that *mouza*. The Maharaja Pudmalabh Deo, whilst he denied, in his written statement, that any portion of

(1) 9 W. R. 338.

(2) I. L. R., 19 Calc. 249; L. R., 19 I. A., 1.

(3) I. L. R., 20 Calc. 93 at p. 99, L. R., 19 I. A., 228 at p. 232.

1893

LUKHI NARAIN JAGADEB v. JODU NATH DEO.

the land claimed belonged to *mouza* Argal, did not assert that *mouza* Dimripal extended westwards, at any point, beyond the western boundary of the area in dispute.

After a great deal of preliminary litigation, issues were adjusted and sent to trial. The only one of them to which this appeal relates was in these terms, "Is the land in dispute part of the "plaintiff's estate *mouza* Argal ?"

The area claimed by the plaintiff consisted admittedly of waste land or jungle, and consequently no evidence of possession was adduced on either side. The plaintiff produced and founded upon the Government survey map of 1839; and a remit was made to an Amin of the Court to ascertain whether the disputed land, or any portion of it, fell within the outlines of *mouza* Argal as shown on the map. Before proceeding to carry out the remit the Amin represented to the Court that he could not do so with absolute accuracy, unless he had the transverse table upon which the map was based, and a theodolite. The Court not being in a position to furnish him with either, and neither of the parties offering to supply the want, directed the Amin to proceed with such materials as he had at his command. Acting under that direction the Amin fixed the starting point at the southern extremity of the boundary line, by taking the evidence of villagers in presence of the parties or their agents, and used his own compass in laying down the line northwards.

The Amin thereafter made his report, accompanied by a map upon which the boundary was laid down, and the evidence which he had taken for his assistance. The boundary included in *mouza* Argal about 47 acres of the area claimed by the plaintiff, and assigned the remainder to *mouza* Dimirpal. The defendant then examined the Amin as a witness, with the view of showing the inaccuracy of his report, and adduced no other evidence. The Subordinate Judge gave effect to the report, and decreed that the plaintiff do recover possession of these 47 acres as shown in the map prepared by the Amin. Their Lordships think it impossible to affirm that, as the respondent argued, there was no evidence before the Court upon which that finding,—which is a pure finding of fact,—could be rested. They assent to the observation made by the Judge that "scientific accuracy is hardly to be expected in such

"cases, substantial justice being all that is necessary for practical "purposes." It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the *onus* incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement.

The decree was brought under review of the District Court of Cuttack. The District Judge, with the view, apparently, of correcting any error which might have arisen from the Amin using his own compass, communicated with the survey officials of the Orissa Circle, which comprehends the land in dispute, and was informed by them that the meridianal lines on the survey maps were intended to show the true north, and that the meridianal line indicated by a magnetic compass would, in that locality, show a deviation which "might be taken to be 2° 50′ east." Having received that information, the District Judge remitted to the same Amin to lay down, upon the map prepared by him, a new boundary line giving effect to the deviation. The Amin did as he was directed, with the somewhat startling result that the new line included in *mouza* Dimripal, not only the whole of the disputed land with the exception of a small area, about two acres in extent, but, in addition, about 53 acres of land which, it had not been disputed, belonged to *mouza* Argal. Upon considering the case, in the light of the information obtained from the survey officials and of the Amin's report to him, the District Judge adhered to the boundary first laid down by the Amin, and affirmed the judgment of the Subordinate Court.

Before this Board, the respondent maintained that the Judge's disregard of the Amin's second report constituted a substantial error or defect in procedure, within the meaning of section 584 (*c*) of the Civil Procedure Code. But he was unable to point out any defect in the conduct of the case: the only error upon which he

1893

LUKHI NARAIN JAGADEB v. JODU NATH DEO.

relied in argument was one which, if it was committed at all, was committed by the Judge, and consisted in his drawing a wrong conclusion from the evidence. The decision of the District Judge, so far as it went, involved no principle of law, and was entirely within his competency. There can be no legal presumption that the line shown on the map of 1839 was laid down according to the true north or that it necessarily represents the real boundary between the *mouzas*. Its accuracy in these particulars must depend upon what was actually done by the persons who made the survey, and transferred the line to the map of 1839, and also upon the information by which they were guided. There can be no necessary presumption of fact, either that a line dividing jungle land was laid down with scientific exactitude, or that the precise boundary was a whit better known in 1839 than at the time when the Amin made his survey for the purposes of this case.

The respondent presented an appeal to the High Court, and objections to its competency were heard before TOTTENHAM and NORRIS, JJ., who ordered the case to be taken up as a regular appeal and to be decided on the evidence. In delivering their reasons for that decision, they observed that "the District Judge's "judgment is very unsatisfactory as to the *ratio decidendi* that the "Civil Court Amin fell into error. We are not satisfied that "there was evidence before him which justified his finding." And they added:—"We think that the proper course is to call up the "case as a regular appeal before ourselves, and go through the "evidence and come to the best decision we can." It is clear that, in adopting that course, the learned Judges exceeded the statutory limits of their jurisdiction. They had no power to entertain the case except as an appeal from an appellate decree, and that only upon the grounds specified in section 584 of the Civil Procedure Code, which deprives them of the right to review findings of fact by the First Appellate Judge, unless these are tainted with one or other of the errors or defects specified in its sub-sections. Upon that point, it is sufficient to refer to the recent decisions of this Board, in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) and *Ramratan Sukal* v. *Nandu* (2).

(1) I. L. R. 18 Calc., 23; L. R. 7 I. A., 122.
(2) I. L. R. 19 Calc., 240; L. R. 19 I. A., 1.

The case was accordingly heard, as a regular appeal, before NORRIS and BEVERLEY, JJ., who set aside the judgments of the Courts below, gave effect to the line of boundary laid down by the Amin on remit from the District Judge, and found that the small excepted area of two acres was the only portion of the disputed land belonging to *mouza* Argal. For that area they gave a decree in terms of the plaint.

The terms of the judgment delivered are certainly calculated to suggest that the learned Judges had applied their minds to the evidence in the case, and had come to an independent conclusion. They pass in review the whole proceedings which had taken place before the Subordinate and District Courts with a view to the elucidation of the boundary, and then go on to say:—"We are of "opinion that this retracing of the Amin ought to be accepted as "correct." It appears, however, that their decision was not really intended to proceed upon a reversal of the District Judge's findings of fact. The case again came before the same learned Judges, on an application for review; and, on that occasion, they concurred in stating that their decision was due to their having formed the opinion "that the parties agreed to accept the District "Engineer's statement, whether it was correct or not, as the "basis upon which the measurement should be made." Seeing that no allegation had been made or proof tendered of any agreement to that effect, its existence must have been matter of legal inference from the record.

When thus explained, the ground upon which the case was disposed of by the High Court was sufficient to justify an appeal under section 584. It appears to their Lordships that the District Judge must be held to have erred in law, within the meaning of that clause, if the record discloses a judicial agreement by both parties to accept as conclusive a boundary laid down upon the Amin's map deviating the original line in accordance with the information given by the Government Engineer. The respondent's Counsel had very little to say in support of such an agreement; and their Lordships have been unable to discover any trace of one in the record, or any circumstance which could bar the present appellant from objecting to the effect of the information or of the remit which followed upon it. There is no

1893

LUKHI NARAIN JAGADEB v. JODU NATH DEO.

more room for suggesting that the appellant agreed to abide by the second remit than for the suggestion that Pudmalabh Deo agreed to accept the first.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from, and to restore the judgment of the District Judge. The respondent Jodu Nath Deo must pay the costs in the High Court and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: Mr. *J. F. Watkins.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

1894 *January* 25.

MOKUNDA BULLAV KAR (DEFENDANT) *v.* BHOGABAN CHUNDER DAS AND OTHERS (PLAINTIFFS).*

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), *s.* 373—*Applicability of s.* 373 *to suits under Act X of* 1859.

Section 373 of the Code of Civil Procedure (as to withdrawing suits with liberty to bring a fresh suit) does not apply to suits under Act X of 1859 which is a complete Code by itself.

THIS was a suit for arrears of rent for the years 1295 and 1296 brought under clause 4 of section 23 of Act X of 1859. A previous suit for arrears of rent for the years 1294, 1295, and 1296 had been brought by the plaintiffs, but that suit was withdrawn on the 30th December 1890.

The only defence material to this report was that the plaintiffs in withdrawing the previous suit did not obtain any permission to institute a fresh suit (as it was contended they should have done under section 373 of the Civil Procedure Code), and that not having

* Appeal from Appellate Decree No. 589 of 1892, against the decree of B. L. Gupta, Esq., District Judge of Cuttack, dated the 21st of January 1892, affirming the decree of T. J. Mendes, Esq., Deputy Collector of Balasore, dated the 7th of November 1891.

done so, they could not maintain the present suit. It was found that no express order was made at the time of the withdrawal of the suit, giving the plaintiffs permission to bring a fresh suit, and the question of the applicability of section 373 of the Code was raised in the first Court, that of the Deputy Collector of Cuttack, and decided in favour of the plaintiffs, the Court holding that that section was not applicable to suits under Act X of 1859.

The defendant appealed to the Judge and again raised this question, but the decision of the Deputy Collector was affirmed on other grounds.

The defendant appealed to the High Court on the ground that section 373 was applicable to rent suits under Act X of 1859, and that, no permission to bring a fresh suit having been obtained under that section, the suit was not maintainable.

Mr. *M. N. Datta* and Babu *Barkant Nath Das* for the appellant.

Dr. *Trailakhya Nath Mitter* and Babu *Lal Mohan Das* for the respondents.

The arguments on the point raised and the cases cited are sufficiently stated in the judgment of the Court (GHOSE and RAMPINI, JJ.) which was as follows:—

This appeal arises out of a suit for rent for the years 1295 and 1296 brought before the Deputy Collector of Cuttack under the provisions of Act X of 1859.

It appears that the plaintiffs had previously instituted a suit for the rent of the same period in the same Court; but before the trial came on, certain formal defects having been discovered in the suit, an application was made by the plaintiffs to be allowed to withdraw it, with liberty to bring a fresh suit upon the same cause of action. The suit was accordingly allowed to be withdrawn; but no distinct order was recorded by the Revenue Court permitting the plaintiffs to bring a fresh suit.

The defendant contended in the Court of first instance, and the contention has been repeated before us in second appeal, though it seems to have been practically abandoned in the Court of appeal below, that the provisions of section 373 of the Civil Procedure Code are applicable to suits under Act X of 1859; and that, because

1894

MOKUNDA BULLAV KAR v. BHOGABAN CHUNDER DAS.

no permission had been accorded by the Court when the previous suit was withdrawn, permitting the plaintiffs to bring a fresh suit upon the same cause of action, this suit could not be maintained.

The question that arises upon this contention is shortly this, whether the provisions of section 373 of the Civil Procedure Code apply to a suit under Act X of 1859.

Section 23 of Act X of 1859 enacts, among other matters, that all suits for arrears of rent due on account of land either *khiraji* or *lakhiraj* shall be cognizable by Collectors of land revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal as provided in it, shall not be cognizable in any other Court, or by any other officer, or in any other manner. And the Act lays down the procedure to be followed in regard to the institution of a suit for rent, and in regard to the trial thereof. There is no provision in the Act as to the withdrawal of a suit; but we imagine that it is an inherent power in every Court to allow a suit to be withdrawn upon application made by the plaintiff. There is no indication in the Act itself that the provisions of section 373 of the Civil Procedure Code would be applicable to a suit brought under that Act.

This point seems to have been recently considered by a Division Bench of this Court in the case of *Radha Madhab Santra* v. *Lakhi Narain Roy Chowdhry* (1), and the learned Judges, following the decision of the Full Bench in the case of *Nagendro Nath Mullick* v. *Mathura Mahun Parhi* (2), held that Act X of 1859 was a complete Code by itself, and therefore section 373 of Civil Procedure Code was not applicable to rent suits under Act X of 1859.

In the case of *Nagendro Nath Mullick* v. *Mathura Mahun Parhi* (2) to which we have just referred, the question that came before the Court for consideration is not precisely that which we have to consider in this case. But in deciding the question which the Court was then called upon to decide, they had to consider whether Act X of 1859 was a complete Code by itself or not, and the learned Judges held that it was so.

We might also refer to an earlier case on the point decided on the 16th September 1862 by a Bench of three Judges, consisting

(1) *Ante*, p. 428. (2) I. L. R., 18 Calc., 368.

of Sir Barnes Peacock, C.J., and Bayley and Kemp, JJ., the case of *Doyal Chunder Ghose* v. *Dwarka Nath Misser* (1). In that case, the learned Judges held that the provisions of section 97 of Act VIII of 1859, which was in the same terms as section 373 of the present Civil Procedure Code, did not apply to suits under Act X of 1859.

So far therefore as this Court is concerned, the question seems to be concluded by authority.

But the learned Counsel for the appellant has called our attention to the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (2), as also to the cases of *Madho Prakash Singh* v. *Murli Monohar* (3), and *Adhirani Narain Kumari* v. *Raghu Mohapatro* (4).

In the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (2) the question that was discussed before the Privy Council was simply whether a Revenue Court under Act X of 1859 had authority to transfer an execution case from its own file to the file of a civil court in another district for the purpose of execution of the decree; and the Judicial Committee held that the scope of Act X of 1859 appears to be only to provide for the execution of the decree of the Collector within his own jurisdiction, and that there is nothing in the Act to forbid the conclusion that such executions are left to the operations of Act XXXIII of 1852 or the corresponding portion of Act VIII of 1859; that is to say, there being nothing in the Act X of 1859 to prohibit a Collector acting under that Act from transferring an execution case from his own file to the file of a civil court, the procedure laid down in the Civil Procedure Code might be followed in the matter of the transfer of the decree for execution to some other court.

In the case before the Allahabad High Court, no doubt a question similar to that which is raised in the present case was discussed; but then the learned Judges had to consider, not the provisions of Act X of 1859, but those of Act XII of 1881, which is only applicable to the North-Western Provinces, though it may be that this latter Act contains provisions similar to those in Act X of 1859.

(1) Marsh, 148.
(2) I. L. R., 9 Calc., 295; L. R., 9 I. A., 174.
(3) I. L. R., 5 All., 406.
(4) I. L. R., 12 Calc., 50.

1894

MOKUNDA BULLAV KAR v. BHOGABAN CHUNDER DAS.

As to the case of *Adhirani Narain Kumari* v. *Raghu Mohapatro* (1) the question which the learned Judges had to consider was, whether the provisions of section 43 of the Civil Procedure Code were applicable to a suit under Act X of 1859.

The question whether section 373 of the Code is applicable to suits under Act X of 1859 does not seem to have been considered in any other case than the cases we have already referred to; and we think we ought to guide ourselves in the decision of the question raised in this case by the opinion that has so often been expressed by this Court.

Upon these grounds we overrule the plea of the learned Counsel for the appellant.

The second question raised before us is this, whether the plaintiff was bound to produce a certificate of succession under the Succession Act, VII of 1889, before he could obtain a decree for the rent claimed in this case.

Now, section 4 of the Act, to which reference has been made, among other things enacts:—"The word 'debt' in subsection (1) includes any debt except land revenue or profits payable in respect of land used for agricultural purposes." Now, on reference to the lease filed in this case, it appears to us to be clear enough that the lands in respect of which rent is now claimed are lands which have been used or let out for agricultural purposes. The learned Counsel for the appellant argued that it was a lease, not only of agricultural lands, but also of *phalkar*, *bankar*, *jalkar*, and homestead lands, and therefore section 4 had no application. We are not prepared to accept this contention. It seems to be clear upon a perusal of the lease that the real object for which it was granted was for agricultural purposes. That being so, we think this objection also cannot be sustained.

The appeal is dismissed with costs.

Appeal dismissed.

J. V. W.

(1) I. L. R., 12 Calc., 50.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

SUBHA BIBI (DEFENDANT No. 1) *v.* HARA LAL DAS (PLAINTIFF) AND ANOTHER (DEFENDANT No. 2).*

1894 *Feb.* 14.

Benami purchase—Certified purchaser—Civil Procedure Code, 1882, *s.* 317 *—Suit by execution creditor for declaration that property is liable to be sold in execution of decree as belonging to his debtor.*

The plaintiff lent money to *F* on a bond, and after his death sued his representative to recover the money out of the deceased's assets, and obtained a decree, in execution of which he attached certain property. *S* preferred a claim to the property on the ground that she was the purchaser of it at an execution sale, and it was released. The plaintiff then brought a suit against *S* and *F's* representative for a declaration that the property was the property of his debtor *F*, and was therefore liable to be sold in execution of his decree. *Held*, that the suit was not barred by s. 317 of the Civil Procedure Code. *Kanizak Sukina* v. *Monohur Das* (1); *Seetanath Ghose* v. *Madhub Narain Roy Chowdhry* (2); *Khyrat Ali* v. *Syfulluh Khan* (3); *Sohun Lall* v. *Lala Gya Pershad* (4); and *Puran Mal* v. *Ali Khan* (5) followed *Rama Kurup* v. *Sridevi* (6) dissented from.

THE plaintiff lent money to one Fateh Ali on a bond, and after the death of Fateh Ali, sued his sister and heir, Fakurunnissa, the defendant No. 2, for recovery of the amount due on the bond from his assets, and obtained a decree on 16th March 1887, in execution of which he attached the property now in suit as the property of his deceased debtor, Fateh Ali. The defendant No. 1, Subha Bibi, thereupon preferred a claim to the attached property on the ground that she had purchased it at an auction sale and obtained a certificate for her purchase, and on the 4th October 1888 it was released from attachment.

The plaintiff now sued Subha Bibi and Fakurunnissa for a declaration that the property belonged to his debtor, Fateh Ali, and

* Appeal from Appellate Decree No. 1199 of 1892 against the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of Dacca, dated the 29th of June 1892, affirming the decree of Babu Nogendra Nath Dhur, Munsif of Dacca, dated the 12th of January 1891.

(1) I. L. R., 12 Calc., 204.
(2) 1 W. R., 329.
(3) 8 W. R., 130.
(4) 6 N. W., 265.
(5) I. L. R., 1 All. 235.
(6) I. L. R., 16 Mad 290.

1894

SUBHA BIBI v. HARA LAL DAS.

was liable to be sold in execution of the decree obtained by the plaintiff against his representative.

The only defence material to this report was that the suit was barred by s. 317 of the Code of Civil Procedure, which says :— "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims. Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser."

The Munsif was of opinion that section 317 of the Code was not applicable and on the facts that the real purchaser was Fateh Ali, who had bought the property in the name of Subha Bibi, and that it was therefore liable to be sold in execution of the plaintiff's decree.

The Subordinate Judge on appeal held that section 317 did not preclude the plaintiff from showing the real nature of the transaction with reference to the alleged purchase by Subha Bibi; as to the purchase he agreed with the Munsif that it was made by Fateh Ali in the name of Subha Bibi. He therefore dismissed the appeal.

The defendant No. 1 appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Jogesh Chandra Roy* for the appellant.

Babu *Srinath Das* and Babu *Tara Kishore Chowdhry* for the respondent.

The judgment of the Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

The only real question for our decision is whether the terms of section 317 of the Code of Civil Procedure bar the suit. As against the appellant's contention there are to be found at least three reported cases of this Court, *Kanizak Sukina* v. *Monohur Das* (1), *Sectanath Ghose* v. *Madhub Narain Roy Chowdhry* (2), and a third case, not so much in point, *Khyrat Ali* v. *Syfullah Khan* (3).

(1) I. L. R., 12 Calc., 204. (2) 1 W. R., 329.
(3) 8 W. R., 130.

1894

SUBHA BIBI v. HARA LAL DAS.

There are also against the appellant's contention two Allahabad cases, *Sohun Lall* v. *Lala Gya Pershad* (1), and *Puran Mal* v. *Ali Khan* (2).

It is true that the appellant has in his favour a very recent case—*Rama Kurup* v. *Srideri* (3)—in which the learned Judges came to the conclusion that the case of *Kanizak Sukina* v. *Monohur Das* (4), was wrong; but in that case the learned Judges do not seem to have been referred to any of the other decisions.

Before we could give effect to the appellants' contention we should have to refer the case to a Full Bench: but as we agree with the judgment of Mitter and Macpherson, JJ., in *Kanizak Sukina* v. *Monohur Das* (4), which supports the cases of *Seetanath Ghose* v. *Madhub Narain Roy Chowdhry* (5), and *Khyrat Ali* v. *Syfullah Khan* (6), we decline to refer this case to a Full Bench, and dismiss the appeal with costs.

Appeal dismissed.

J. V. W.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Prinsep.

1894 *Feb.* 14.

DURGA CHURN LASKAR AND OTHERS (PLAINTIFFS) *v.* HARI CHURN DAS AND OTHERS (DEFENDANTS).*

Bengal Tenancy Act (VIII of 1885), s. 108—Record of rights—Appeal to Special Judge—Publication of record of rights—Bengal Tenancy Act, ss. 55, 105, 106.

There is nothing in section 108 of the Bengal Tenancy Act which limits the jurisdiction of a Special Judge to deal only with matters of objection taken after publication of the record of rights.

THIS was an appeal against an order of the District Judge of Backergunge reversing an order of a Revenue Officer purporting to have been passed under s. 106 of the Bengal Tenancy Act.

* Appeal from Appellate Decree No. 1414 of 1892, against the decree of A. E. Staley, Esq., Special Judge of Backergunge, dated the 27th of May 1892, reversing the decree of Mr. D. Dutt, Settlement Officer, Government estates, Backergunge, dated the 25th of September 1891.

(1) 6 N. W., 265.
(2) I. L. R., 1 All. 285.
(3) I. L. R., 16 Mad. 290.
(4) I. L R., 12 Calc., 204.
(5) 1 W. R., 320.
(6) 8 W. R., 130.

1894

DURGA CHURN LASKAR v. HARI CHURN DAS.

It appeared that the Revenue Officer was preparing a record of rights of *khas mehal* No. 5256, *chur* Umed, and that on the 10th March 1891 he directed that the names of the plaintiffs should be struck out, and the names of the defendants entered in their stead, as the *jotedars* of 59 fields on the Amin's *khasra*. On the 8th April 1891 the plaintiffs objected to this order and to the substitution of the defendants' names instead of their own. The Revenue Officer treated this objection as one made under s. 106 of the Bengal Tenancy Act, and, making the defendants parties in the case, tried it as a suit, and found that the defendants were in possession of the disputed land; but that, though their possession was based on no valid title, yet as the plaintiffs could show no valid title to the land, the case should be decided on the actual possession; and he therefore held that the plaintiffs' suit ought to be dismissed, and refused to record their names on the register as the *jotedars* of the land in question.

The plaintiffs appealed to the Special Judge under s. 108 of the Bengal Tenancy Act. At the hearing of this appeal it was discovered that the Revenue Officer had not either at the time of passing his order striking out the name of the plaintiffs from the *khatian* of the Amin, or previously to his order then under appeal, made any publication of the record of rights in the manner directed by s. 105 of the Tenancy Act and the rules made under Chapter VI of that Act. The Judge, therefore, held that the order striking out the name of the plaintiffs was merely an executive order and not one made under s. 106, inasmuch as at that time no record of right had been completed and published; he therefore quashed the order of the Revenue Officer as having been made without jurisdiction, considering that he himself had no jurisdiction to pass any further order in the case.

The plaintiffs appealed to the High Court.

Babu *Trailokya Nath Mitter* and Babu *Chunder Kant Sen* for the appellants.

Dr. *Rash Behari Ghose* for the respondents.

The judgment of the Court (PETHERAM, C.J. and PRINSEP, J.) was as follows:—

This is a matter under s. 102 of the Bengal Tenancy Act in which the Revenue Officer was making a record of rights

1894

DURGA CHURN LASKAR v. HARI CHURN DAS.

of a certain estate. The matter in dispute between the parties was as to who should be recorded as tenants of these particular lands, the plaintiffs contending that they held a half share with the defendants; the defendants, on the other hand, stating that they were the sole tenants. Before any record of rights could be prepared, it was absolutely necessary for the Revenue Officer to ascertain, in the first place, who were actual tenants of these particular lands. He proceeded under s. 107 to try the matter in dispute as therein directed, and his order in favour of the defendants was taken in appeal to the Special Judge under section 108. The Special Judge, however, has refused to try the appeal holding that the proceedings were entirely without jurisdiction because the record of rights had not been published in the manner directed by s. 105, and therefore, in his opinion, the Revenue Officer was not competent to receive and consider any objections that might be made, and not only was the Revenue Officer not competent to make any order, but there was nothing to give him the (Special Judge) jurisdiction to try the appeal on the merits.

The matter in dispute, however, was dealt with under section 106, and there is nothing under section 108 which limits the jurisdiction of the Special Judge to deal only with matters of objection taken after publication of the record of rights. We, therefore, think that the order of the Special Judge was erroneous, and we accordingly set it aside. The appeal will be tried on the merits. The costs will abide the result.

Appeal allowed.

T. A. P.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

THOMPSON v. CALCUTTA TRAMWAYS COMPANY.*

1894 *Feb. 26.*

Appeal to Privy Council—Civil Procedure Code, 1882, *ss.* 596, 600—*Finding of facts not concurrent but in effect the same—Case in which no question of law is involved.*

Where there is no point of law involved in a case, the mere fact that the finding of the Appellate Court does not in terms coincide with the finding of the Original Court, is not sufficient, where the findings of fact of the

* Application in Original Civil Suit No. 517 of 1893.

1894

THOMPSON v. CALCUTTA TRAMWAYS COMPANY.

two Courts are in effect the same, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is more than Rs. 10,000. *In the matter of the petition of Ashghar Reza* (1) distinguished.

THIS was an application, under Chapter XLV of the Code of Civil Procedure, for leave to appeal *in formâ pauperis* to Her Majesty in Council.

The original suit was one brought by the plaintiff, petitioner, against the Calcutta Tramways Company to recover Rs. 20,000 as damages for personal injuries sustained by him whilst entering the defendant Company's cars. The defence put forward by the defendant Company was that the accident was not caused by negligence on the part of their servants, but by negligence on the part of the plaintiff himself.

The Original Court dismissed the suit holding that the plaintiff had been guilty of contributory negligence, but without finding that negligence had been established on the part of the servants of the defendant Company.

On appeal, the Court, after taking further evidence, found that the plaintiff had failed to show how the accident had been caused, and had therefore failed to show that it had been caused by negligence on the part of the servants of the defendant Company, and affirmed the decree of the lower Court.

The petitioner then made an *ex-parte* application *in formâ pauperis*, for leave to appeal to Her Majesty in Council on the ground (1) that the value of the suit was over Rs. 10,000; (2) that the findings of fact on the Original and Appellate Court were not concurrent findings; and (3) that there were also points of law involved in the case. The petitioner, however, although setting out fully his grounds of appeal, did not state in accordance with s. 600 that his case fulfilled the requirements of s. 596.

Mr. *Solaiman* for the applicant contended that he was entitled to a certificate, and cited *In the matter of Ashghar Reza* (1).

SALE, J., (after stating the facts and stating that the conclusion to which he had come rendered it unnecessary to direct the issue of notice to the defendant Company to show cause against the application), continued:—

It is suggested that as the finding of the Appellate Court did not in terms coincide with the finding of the Original Court as to

(1) I. L. R., 16, Calc., 287.

contributory negligence on the part of the plaintiff, and as the value of the suit is alleged to be over Rs. 10,000, the plaintiff is entitled to obtain a certificate on the authority of the case of *In the matter of the petition of Ashghar Reza* (1).

In that case the Appellate Court differed from the lower Court as to the effect of an *ikrarnama*, and decided the case upon an issue not raised in the lower Court. There were also points of law involved in that case.

In the present case the issue of fact was the same in both Courts. The findings of fact in both Courts are also in effect the same, namely, that the plaintiff had failed to establish the case alleged by him, which, if established, would have rendered the defendant Company civilly liable. The Appellate Court concurred in the result, and the decree of the Original Court was affirmed.

Under these circumstances, and having regard to the fact that there is, as between the parties, no question of law involved in the case, it appears to me that I am justified in disposing of this application without putting the parties to unnecessary costs by directing the issue of a notice to the defendant Company.

The applicant has also asked for leave to appeal as a pauper. That raises an important question as to whether this Court has power to grant leave to appeal to Her Majesty in Council *in formâ pauperis*, and to dispense with the usual security for the costs of the respondent required by s. 602, but it is unnecessary to consider that question in the view I have taken as regards the substantive part of this application. It is also to be observed that the petition itself is defective in form, inasmuch as it does not, as required by s. 600 of the Code, conclude with the usual prayer for a certificate that the case fulfils the requirements of s. 596. That, too, is a mattter which it is not necessary to deal with now.

The application is refused.

Attorney for the petitioner: Mr. *C. A. Smith.*

T. A. P.

(1) I. L. R. 16 Calc., 287.

CIVIL RULE.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

1894
Jan. 8.

HEWETSON (PLAINTIFF) *v.* DEAS AND OTHERS (DEFENDANTS).*

Security for costs—Civil Procedure Code (Act XIV of 1889), s. 549—Poverty of appellant—Ground for ordering security for costs of appeal.

Under the circumstances of this case the Court refused an application that the appellant, on the ground that he was a person without means, should give security for the costs of the appeal.

THIS was a rule granted by PETHERAM, C.J., and RAMPINI, J., on the application of the respondents, that the appellant might be required to furnish security for the costs of the appeal as well as for those decreed in the lower Courts. The suit was one brought by a sub-contractor against his employers, who were themselves contractors, for an account. Both the Court of first instance and the first Appellate Court held that such a suit would not lie, and the suit was dismissed in both Courts with costs.

The plaintiff appealed to the High Court, and the appeal was admitted under section 551 of the Civil Procedure Code. The respondents then applied upon affidavits under section 549, alleging, among other things, that payment of the costs decreed in the lower Courts, although demanded, had not been made, that the appellant was an undischarged insolvent and was not possessed of sufficient means to pay either these costs, or such costs as were likely to be incurred on second appeal, and that the appeal was not one which was likely to succeed.

Babu *Srinath Das* and Babu *Rajendra Nath Bose* showed cause.

Mr. *Donogh* in support of the rule.

Babu *Srinath Das* :—It is not denied that the appellant is a poor man, or that he is an insolvent. But poverty is not a ground for requiring security for costs from a plaintiff: see *Jiwan Ali Beg*

* Civil Rule No. 1864 of 1893 against the order of T. D. Beighton, Esq., District Judge of 24-Pargannas, dated 22nd of May 1893.

v. *Basu Mal*(1) which was decided by a Full Bench of the Allahabad High Court; nor is insolvency—*Rhodes* v. *Dawson*(2).

Mr. *Donogh* in support of the rule:—This is not the case of a plaintiff who might be debarred from his right to sue by such an order. The appellant has already exercised his right in two Courts, both of which have held that such a suit will not lie, and there can be no doubt the appeal is one which is not likely to succeed ultimately, because a suit for account will only lie, when a fiduciary relation can be established, as by a principal against his agent, certainly not as between sub-contractor and his employer.

The affidavits show that the appellant is an undischarged insolvent, that he has not paid the costs already incurred in the lower Courts, and that he is, so far as can be ascertained, not possessed of property exceeding Rs. 20 in value. He does not pretend to deny these facts. The result will be, if security is not taken, that the respondents will be put to the expense of defending the suit a third time, and, in the event of their succeeding, there is not the slightest prospect of their recovering any costs.

This is itself a sufficient ground for requiring security from an appellant—see *Harlock* v. *Ashberry*(3). Insolvency has been held to be *primâ facie* a sufficient reason for ordering security to be given by an appellant: *In re Ivory-Hinkin* v. *Turner*(4).

The judgment of the Court (BEVERLEY and AMEER ALI, JJ.) was as follows:—

We think that, having regard to the fact that the insolvency alleged took place so long ago as in 1873, and that the second appeal in this case has been admitted by a Bench of this Court under section 551 of the Code, we ought not to call upon the plaintiff, appellant, to furnish security. The rule will, therefore, be discharged, but without costs.

Rule discharged.

J. V. W.

(1) I. L. R., 8 All., 203.
(2) L. R., 16 Q. B. D., 518.
(3) L. R., 19 Ch. D., 84.
(4) L. R., 10 Ch. D., 372.

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

1894 *Jan.* 18.

THE CORPORATION OF CALCUTTA (DEFENDANT) *v.* JADU LALL MULLICK AND OTHERS (PLAINTIFFS).*

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), *ss.* 2, 252, 256, 257, 265—*Calcutta Municipal Act (Bengal Act IV of* 1876), *ss.* 280, 281, 282—*Basti land—Urgency—Trespass—Suit for damages.*

Section 2, paragraph 5 of Bengal Act, II of 1888, the Calcutta Municipal Consolidation Act (by which Act the former Calcutta Municipal Act Bengal Act IV of 1876 is repealed) provides that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been *commenced* under the new Act; but though commenced before the passing of the new Act they must, to be effectual, be continued under its provisions, and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them.

Where therefore before the passing of the Act II of 1888 and whilst Act IV of 1876 was in force, the Municipality took measures under the latter Act to cleanse *basti* land which was in an insanitary state, and notwithstanding the passing of Act II of 1888 which provided totally different preliminaries and procedure for the purpose, continued the improvements practically under the Act of 1876, *Held* that even if the proceedings could be considered, under section 2 of Act II of 1888, to have been commenced under the new Act, the action of the Municipality amounted to trespass for which they were liable in damages to the owner of the land.

THE plaintiffs in this case were the owners of a piece of tenanted land known as Raja Bagan *basti;* Jadu Lall Mullick being entitled to one equal undivided moiety therein and the other two plaintiffs being entitled to the other moiety. On the 19th October 1887 as the result of an application made by some of the residents of the *basti* to the Municipality to take over a certain narrow slip of land for the purpose of making a Municipal road (a piece of land not affected by this suit), the Officiating Chairman of the Corporation furnished to the Commissioners a written report in which he recommended the acquisition of the Raja Bagan *basti* under a drainage project.

* Original Appeal No. 32 of 1893 in suit No. 459 of 1891.

On the 22nd October 1887 the Commissioners in meeting resolved that an inspection of the *basti* should be ordered by two medical men under section 280 of the Calcutta Municipal Act (Bengal Act IV of 1876), and that the further consideration of the matter should be referred to the *Basti* Committee. On the 9th November 1887 at certain proceedings of the *Basti* Committee the Chairman moved for a medical inspection in order that subsequent proceedings under section 283A of Bengal Act IV of 1876 should be taken, but it was resolved that orders should be passed only for a medical examination under section 280 of the Act. This resolution was confirmed on the 26th January 1888 at a quarterly meeting of the Commissioners. On the 21st April 1888 a medical report by two medical gentlemen was made, in which they recommended (omitting such portions as do not refer to the land in suit) that the existing roads in Raja Bagan *basti* should be widened to 30 feet; that a new latrine and bathing place should be erected; that all the roads should be sewered; that a tank should be filled in, and that surface drains should be made in the place of existing drains. On the 31st May 1888 the owners of the *basti*, with the exception of Jadu Lall Mullick, agreed to make over to the Municipality sufficient land to make the existing roads 30 feet in width, and they suggested that the rest of the proposed improvements should be abandoned; and it was then resolved by the *Basti* Committee that a revised plan showing the new improvements desired by the owners should be prepared. On the 28th June 1888 at a proceeding of the *Basti* Committee the proposal of the Chairman that a revised plan should be accepted was carried. On the 8th September 1888 the Chairman of the Municipality submitted to the *Basti* Committee a report which on the 11th September 1888 was considered by that *Basti* Committee, who at a meeting agreed that the revised plan should be referred to the medical officers for adoption by them as an alternative recommendation in their report. The medical officers, however, refused to adopt the recommendation. On the 21st March 1889 the *Basti* Committee met and again considered the report of the 8th September 1888, and eventually adopted it, and submitted it to the Commissioners in meeting for orders under section 281 of Act IV of 1876.

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

On the 1st April 1889 the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) came into force. On the 4th April 1889 the first meeting of the Commissioners under the new Act was held, and at such meeting the resolution of the *Basti* Committee of the 21st March 1889 was confirmed. On the 20th June 1889 the Secretary of the Corporation wrote to Jadu Lall Mullick, requiring him within three months to make or complete two 30-feet roads on the north and east of his property, which were to be metalled and sewered with surface drains to the satisfaction of the Commissioners. On the 24th August 1889 the Secretary again wrote to Jadu Lall Mullick, informing him that unless he set to work within 15 days to carry out the improvements referred to in the last letter the Commissioners would step in and do the work at his cost. On the 9th September 1889 Jadu Lall Mullick through his Attorney protested against the threatened action of the Commissioners, but to this protest the Secretary replied that the matter could not be re-opened, it having been finally considered by the Commissioners, stating that if the land were not willingly given up for the improvement of the *basti* the Commissioners would execute the work without any further notice. On the 12th May 1891 notice of suit was given to the Commissioners, and on the 26th May 1891 the Corporation dug up 17 cottahs and 12 chittaks of land in the *basti* and converted it into roads. Jadu Lall Mullick, therefore, on the 25th August 1891 filed this suit against the Corporation asking for a declaration of his rights to the land entered upon by the Corporation, for an injunction restraining the Corporation from continuing to trespass on the land, and for Rs. 2,500 as damages, or in the alternative for Rs. 15,000, the value of the land taken up. The Corporation filed a written statement justifying their action under Bengal Acts IV of 1876 and II of 1888, setting out all the proceedings taken by the *Basti* Committee and by the Commissioners in meeting.

The case was heard by Mr. Justice Norris, who (after stating the facts as above) held that section 258 of Bengal Act II of 1888, assuming that the proceedings taken by the Commissioners were "proceedings pending" within section 2 of the Act, and that section 258 was applicable, required that the Commissioners in meeting should resolve upon whom a notice should be served,

the time within which the works should be carried out, and which of the works should be carried out; and that the person called upon to execute the works was therefore entitled to the judgment of the Commissioners in meeting as to what was a reasonable time within which the works should be carried out and executed: but inasmuch as the resolution of the 4th April 1889 specified no time within which the works were to be carried out it was therefore bad. He also held that the notice (the letter of the Secretary to Jadu Lall Mullick of the 20th June 1889) was bad; and that as it was only after such notice as is mentioned in section 258 that the Commissioners had power to enter on the land and do the work themselves, the Corporation were trespassers in entering upon the plaintiff's land and widening the roads. The learned Judge, however, held that in his opinion the provisions of section 258 could not be made applicable to the condition of things existing before the section came into force, that there were in the case no "proceedings pending" within the meaning of section 2 of the Act. He therefore gave the plaintiff a decree for the value of the land taken by the Corporation, assessing the same at Rs. 800 a cottah, making a total of Rs. 14,200.

The Corporation appealed.

Mr. *Woodroffe*, Mr. *Pugh*, and Mr. *O'Kinealy* for the appellant.

Mr. *Phillips* and Mr. *Bonnerjee* for the respondent.

Mr. *Woodroffe* submitted (1) that the proceedings were properly initiated under the old Act; (2) the proceedings were saved under section 2, and that the Commissioners had power, therefore, to proceed under section 258 of the new Act; (3) that it cannot be said the proceedings were null and void, because the time has not been specified; (4) that the notice was valid, although it did not mention a time; (5) and as to the price of the land and the damages he referred to Mayne on Damages (8th Ed.), 410, and *Anundo Lall Dass* v. *Boycaunt Ram Roy* (1).

Mr. *Phillips* for the respondent:—In section 3 of the new Act the definition of a *basti* is given: the word "*basti*" is only defined where a separate procedure is prescribed; in other places in the Act

(1) I. L. R., 5 Calc., 283.

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

it has its natural meaning, whatever that may be. The procedure of this Act is confined to *basti* land as defined in the Act. Proceedings commenced under the old Act could in no way be continued under the *basti* provisions of the new Act, as they must be according to a standard plan. The old Act had nothing to do with *bastis* within the meaning of the new Act; the old Act applies to blocks of huts. When a *basti* is in contemplation and there is urgency, then only it is that operations can be taken under the new Act. In detail the new Act as to *basti* procedure differs still more from the old Act: a standard plan has to be approved; the medical officers are to say whether the changes proposed are urgent or not. The report does not distinguish between what is urgent and what may be undertaken under the more dilatory procedure. Can these modes of procedure be applied to continue what has been begun under the old Act? How can they be fitted on? To fit them on, schedule A and the standard plan would have to be done away with. If there is this difficulty of fitting on the new procedure to the old, did the Legislature intend that proceedings commenced under the old Act should be continued under the new Act? And with regard to this I point out that abundant time has been allowed by the new Act for winding up all matters under the old Act; a year has been given before the new Act should come into force. There was here clearly no urgency sufficient to satisfy section 258 of the new Act.

The proceedings of the Commissioners were commenced by the Commissioners calling for the report; if it was called for under the new Act the report must have been one in accordance with the section, but here it was not; the medical report did not distinguish between urgency and non-urgency. Section 2 was never intended to apply to these proceedings at all. The section intends to save *legal proceedings* pending, but not such proceedings as these. What was meant by the section is that proceedings by the old body of Commissioners under the old Act should be legally continuable by the new body under the new Act. Under the old Act the Commissioners might act if there was a risk of disease, but the Legislature could not have contemplated that more than the year allowed before the new Act came into force should have been

required for it. Here no steps have been taken in relation to outsiders until after the new Act came into force. Therefore there was no necessity for the continuance of the old proceedings. As to whether the details ought to have been settled in meeting or out of meeting, the word "Commissioners" means "Commissioners in meeting" in section 258. The option is not to be exercised by one body and the original direction by the other body; here the Commissioners in meeting are to make an order first. I read the section that the Commissioners in meeting, and not the Chairman, should decide whether any steps should be taken after finding out that the *basti* is in an insanitary state. I say that the works that should be done should be decided by the body of the Commissioners. Section 262 shows that the works are to be approved by the Commissioners in meeting. In this case nothing has been decided as to who is to do the work, or the time within which it is to be done. At most all the Commissioners in meeting have done is to say that something is to be done. As to damages, it is not a question of shifting our ground at all; we have merely asked to be placed in the same position as we were before the land was taken. The title to the land passes to the Corporation under the decree. Under section 258 the Corporation do not acquire the land, but merely have a right to make a road. The decree has given damages not for the temporary disposession, but for the permanent disposession.

The following judgments were delivered by the Court (PETHERAM, C.J., PRINSEP and TREVELYAN, JJ.):—

PETHERAM, C.J.—The facts out of which this question arises are so fully stated by the learned Judge in the Court below that I need not relate them here.

I do not think it necessary to express an opinion as to whether the resolution of the Commissioners of the 26th of January 1888 and the report of the medical men submitted in pursuance of it constituted a "proceeding pending" within the meaning of section 2 of Act II of 1888, because I think that even if it were, and so must be deemed to have been commenced under the new Act, the subsequent proceedings were not in accordance with the new Act, and as the old Act was not in force when they were taken, the

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

Municipality had no power by virtue of its provisions to deal with the plaintiffs' land, and that in doing so they committed a trespass.

All that section 2 provides is that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been *commenced* under the new one, but though commenced before the passing of the new Act, they must, to be effectual, be continued under its provisions and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them.

By sections 280, 281, 282 of Act IV of 1876 the Commissioners were empowered when they were satisfied that there was a risk of disease from the condition of an existing *block of huts* to call for a medical report, and to take steps upon it, with a view to the removal of the risk. The power to take steps for the sole purpose of removing the risk of disease in any existing block of buildings is not given by the new Act, and clearly the power given by the old one is taken away by its repeal, but in place of it an entirely new scheme for attaining what is practically the same end is provided by Part III of Chapter X of the Act (ss. 247 to 270). All these sections, except section 270, contemplate that whatever is done, whether it is done by the owners on the requisition of the Commissioners, or by the Commissioners themselves, under the powers created by the Act, shall be part of an entire scheme, under which the whole *basti* in which the works are to be done, shall be remodelled. Sections 257-264 deal with the case of a *basti* in which the huts are in an unhealthy condition, and provide that in such cases the Commissioners may call for a medical report, but the report must be accompanied by a standard plan dealing with the whole *basti*, and must indicate what portion of the work it is necessary to undertake at once in order to remove or abate the unhealthy condition of the *basti*, and if, and when the Commissioners have approved the entire scheme, they may take immediate steps to carry out the works so necessary, and after this has been done, may cause the rest of the scheme to be carried out under the earlier sections, and when the whole has been done the *basti* is to be deemed a remodelled *basti*, in the same way as it would have been if the whole of the proceedings had been under those earlier sections. The only other

power of interference given to the Commissioners is that contained in section 270 by which they are empowered under some circumstances to cleanse a *basti* which is in a filthy condition, and to recover the costs from the occupiers. It is evident that none of these sections contain powers at all similar to those contained in sections 280 *et seqq.* of the repealed Act, but only empower them to remodel the *basti* if it is in an insanitary condition or to cleanse it if it is filthy. What they have done in the present case is neither one nor the other of these things, as they have merely widened the road in a portion of the *basti* under a medical report such as is contemplated by the old Act, and which is not accompanied by anything in the nature of a plan for remodelling the entire *basti*, a work which would not prevent them from taking steps at any time to cause the entire *basti* to be remodelled under the powers of section 252 and the following sections, and to remodel it in such a way as to render all the work which has been done in widening these roads wholly useless. For these reasons I agree with the learned Judge in the Court below that the defendants were not justified in entering upon the plaintiffs' land and making new roads upon it, and that in doing so they committed a trespass for which the plaintiffs are entitled to recover damages. The plaintiffs are entitled for the reasons which I have given to a declaration that notwithstanding what has happened the land in respect of which the action has been brought is still their property, but not to an injunction, and the only other question is what is the measure of the damages to which they are entitled. The only evidence which is relied upon as evidence of damage which appears on this record is the evidence of the value of the land upon which the new roadway has been constructed, and the learned Judge has given judgment for what he finds to be its full value, on the ground that by the wrong which they have done the defendants have so effectually ousted the plaintiffs from the possession of their property that they can never regain it. In this view I am unable to agree. As I have said before I think the action of the defendants in making the road upon the plaintiffs' land was illegal and a trespass, and by such an act they could acquire no right to retain possession of the land trespassed upon as against the owners,

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

and even if they had acted strictly within their rights the property in the land would still have remained vested in the plaintiffs under the provisions of section 265 of the Act, so that the question is, what damages have they subtained by what the defendants have done upon the slip of land which still remains their property.

No evidence has been given that what has been done to the land renders it more unfit for the purpose of building huts upon it, nor of what it would cost to restore the land to the same condition in which it was before the alteration was made. Under these circumstances the damages must be merely nominal as no evidence of any actual damage has been given, and the amount decreed must be reduced to Rs. 20: but inasmuch as I think the plaintiffs are also entitled to a declaration of their title to the land they will retain their costs as awarded to them in the Lower Court, and the decree will be modified to this extent. In this Court each party will pay their own costs on scale No. 2, including the costs of the application to add a fresh ground of appeal. This judgment will be dated as of the 18th of January 1894, being the last day of the hearing.

PRINSEP, J.—I am of the same opinion. Section 281 of the Act of 1876 is no doubt identical with section 252 of the Act of 1888, which by a repeal of the Act of 1876 replaces it, but section 252 contemplates either a standard plan for remodelling a *basti* by which all necessary improvements can be made, or by giving effect to some portion of that plan forthwith on an emergency such as set forth in the first part of section 257 being found to exist. The Act of 1876 does not contemplate the finality which would be the result of a *basti* remodelled under the Act of 1888. In order, therefore, to enable the Commissioners acting under the Act of 1888 to give effect to anything commenced under the Act of 1876, there must be some emergency of the nature stated in section 257. But having regard to the great length of time which has passed since it was under contemplation to take measures for the sanitary improvement of Raja Bagan, it cannot now be reasonably said that this is a matter of any emergency requiring a departure from the ordinary course. If this be so, the only course to bring the matter under the Act of 1888 is on

a plan to remodel the *basti*. This was at one time contemplated, and it so appears from the report of the medical officers appointed to consider the state of the locality. But the subsequent proceedings taken refusing to adopt this report, except in one particular, shows that there was no standard plan accepted.

It is unnecessary that I should refer to the other points raised on this appeal, because I agree in the judgment of the learned Chief Justice.

TREVELYAN, J.—I agree in thinking that the action of the Municipality amounted to a trespass.

The procedure under which the Commissioners were acting when the new Act came into force was of a kind wholly different from that provided under the new Act. The old Act was repealed, so the old procedure could not be continued. In its place there were substituted two systems, the one providing for remodelling *bastis* according to a standard plan, the other giving in section 257, and the following sections, a more peremptory procedure. These sections provide for more urgent cases, there being also in that case a standard plan.

After the repeal of the old Act, the action taken by the Municipality before the new Act came into force became fruitless unless the saving clause of section 2 can be held to be applicable.

That section provides that all proceedings pending at the commencement of the Act, which may have been commenced under the former Act, shall be deemed to have been commenced under the new Act.

Some argument was addressed to us as to the meaning of "proceedings" in this section, and it was contended that they referred only to proceedings in Courts of law. The use of the same word in sections 57, 58, 64, 66, and 67 of the Act would rather point to another construction of the section, but this question need not be decided in this case. For the purposes of argument, we may assume that what had been here done before the new Act came into force amounted to "proceedings" within the meaning of section 2 of the new Act. They could only have been continued under the new Act, if they had been such as could have appropriately been worked from the beginning under the new Act.

1894

THE CORPORATION OF CALCUTTA v. JADU LALL MULLICK.

At the time the new Act came into force the report contemplated by section 230 of the old Act had been referred by the *Basti* Committee to the Commissioners in meeting and nothing more had been done.

On the 4th of April 1889, *i.e.*, after the new Act came into force, the Commissioners made an order under section 258 of the new Act and thereafter purported to proceed under section 259 of the new Act.

Section 258 depends upon section 257. That section only applies when the Commissioners in meeting consider that the procedure provided by sections 252 to 256 will be too dilatory. Nothing of the kind took place here. The omission of this necessary preliminary prevents the application of the summary procedure provided in these sections. There was also no standard plan of the kind provided for in section 257 of the new Act. The matters which were necessary preliminaries to section 258 having any operation having been omitted, I think that section 258 had no application to these proceedings, and that the action which the Municipality purported to take under those sections was illegal.

I may remark that the procedure under section 257, *etc.*, is intended to provide a summary and quick remedy for evils requiring urgent attention. In this case from beginning to end the Municipality expended about 3½ years in this matter.

I agree in the decree referred to in the Chief Justice's judgment.

Decree modified.

Attorneys for appellants: Messrs. *Sanderson & Co.*

Attorneys for respondents: Messrs. *Morgan & Co.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

KHETTRAMONI DASI (PLAINTIFF) *v.* SHYAMA CHURN KUNDU AND OTHERS (DEFENDANTS).*

1894 *Jan* 17.

Appeal—Order refusing to make person party defendant to an application for probate—Probate and Administration Act (V of 1881), *ss.* 53 *and* 86—*Exercise of power of High Court under s.* 622 *of the Civil Procedure Code,* 1882, *where there is no appeal.*

Section 86, read with section 53 of the Probate and Administration Act (V of 1881), only allows an appeal to the High Court in cases in which an appeal is allowable under the Code of Civil Procedure. No appeal therefore lies against an order refusing to make a person opposing probate a party defendant to an application for probate.

Abirunnissa Khatoon v. *Komurunnissa Khatoon* (1) and *Karman Bibi* v. *Misri Lal* (2) followed.

Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court, finding that no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civil Procedure Code, and remanded the case for trial as a contested application.

THIS was an application by one Syama Churn Kundu, alleging himself to be the adopted son of Madhusudan Kundu for probate of the will of his father dated 24th Assin 1299 B.S. (9th October 1892), of which he was appointed one of the executors. The application was opposed by Nistarini Dasi, and she was made a party defendant in the case, but she afterwards withdrew her opposition to probate being granted to the petitioner, Syama Churn Kundu. Subsequently Khettramoni Dasi, the daughter of the testator, on 27th February 1893, put in a petition in oppositoin to the application for probate, in which she alleged collusion between Nistarini and Syama Churn and applied to be made a party

* Appeal from Order No. 74 of 1893 against the order of J. Crawfurd, Esq., District Judge of Hooghly, dated the 8th of March 1893.

(1) I. L. R., 13 Calc., 100. (2) I. L. R., 2 All., 904.

1894

KHETTRAMONI DASI v. SHYAMA CHURN KUNDU.

defendant in the proceedings. On this application the Judge made on 1st March 1893 the following order:—

"It appears to me that as, failing proof of the plaintiff's adoption, the estate of the deceased is fully represented by the defendant, the intervenor Khettramoni has no *locus standi*. The plaintiff strongly objects to her being made a party. In the petition there is no substantial ground for believing that there is collusion between the widow and the plaintiff. The intervenor has no present interest in the estate; administration could not be granted to her in the lifetime of the widow. I therefore refuse to make her a party to this suit."

The case was eventually heard on 8th March, when there was not sufficient proof of the alleged adoption, and probate of the will was ordered to be granted to Syama Churn Kundu as one of the executors of the will as in an unopposed case.

From the order refusing to make her a party Khettramoni Dasi appealed to the High Court.

Babu *Hem Chandra Banerjee*, Babu *Umakali Mukerjee*, and Babu *Tarit Mohan Dass* for the appellant.

Babu *Bhowany Churn Dutt* and Babu *Boido Nath Dutt* for the respondents.

A preliminary objection was taken that no appeal lay.

The judgment of the Court (BEVERLEY and AMEER ALI, JJ.) was as follows:—

In this case a preliminary objection has been taken that no appeal will lie against the order of the learned District Judge, and we are of opinion that this objection is well founded. It is contended that under section 86 of the Probate and Administration Act the order is appealable. That section runs as follows:—"Every order made by a District Judge or district delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals." Reading that section with section 53 of the same Act we are of opinion that it only allows an appeal to this Court in cases in which an appeal is allowable under the Code of Civil Procedure. Now, this is an appeal against an order refusing to make the appellant a party defendant in the application for probate; in other words, to add her as a defendant in the case under the provisions of section 32 of the Code. It has

been ruled, however, by this Court in the case of *Abirunnissa Khatoon* v. *Komurunnissa Khatoon* (1) and by the Allahabad High Court in *Karman Bibi* v. *Misri Lal* (2) that under section 588, clause 2 of the Code, an appeal will not lie against an order refusing to add the name of any person as plaintiff or defendant. That being so, we are of opinion that we ought to follow the decisions referred to, and as at present advised we must hold that no appeal will lie. We intimated this opinion at the rising of the Court yesterday, and to-day the learned pleader for the appellant has put in an application under section 622 of the Code asking us to interfere on the ground that the District Judge in refusing to hear Khettramoni Dasi has acted illegally and with material irregularity. We have heard the other side in the matter of this application, and we are of opinion that under the circumstances this is a case in which we ought to interfere. The learned pleader for the opposite party has relied upon the case of *Rabbaba Khanum* v. *Noorjehan Begum* (3), but we are of opinion that the circumstances of that case were very different from those in the case before us. In the present case it appears that the widow of the deceased, Nistarini Dasi, in the first instance opposed the grant of the probate, but she subsequently applied to withdraw her objections, and after that the appellant and petitioner before us, Khettramoni Dasi, who is the daughter of the deceased, applied that she might be made a party in order to contest the grant of probate. On the 8th of March 1893 the District Judge made this order:—(reads order *ante* p. 540). The same day that this order was made the case was heard, and it was heard as an unopposed case.

The District Judge states in his decree that "the objection on behalf of the female defendant," (that is, of the widow Nistarini Dasi) "having been withdrawn, the case was heard without being contested." It appears to us that when the Judge found, on proceeding with the trial, that the widow Nistarini was not contesting the case, there was ground for supposing that there was collusion between her and the petitioner, and that he ought to have allowed the applicant Khettramoni to take her place, so to say, and to

(1) I. L. R., 13 Calc., 100. (2) I. L. R., 2 All., 904.
(3) I. L. R., 13 Calc., 90.

1894

KHETTRAMONI DASI v. SHYAMA CHURN KUNDU.

contest the grant of the probate. It has been contended that Khettramoni has no such interest in the estate of the deceased as would entitle her to be heard in these proceedings, but we think that is not the case. It is clear that if the deceased died intestate Khettramoni would have an interest in the property upon the death of the widow; and there being ground for supposing that the widow was colluding with the applicant for probate, we think that Khettramoni had a right to be heard in these proceedings, and that the case should have been treated and tried as a contentious case. We accordingly set aside the decision of the District Judge and send the case back to him in order that Khettramoni, the applicant before us, may have an opportunity of contesting the case, and that the will may be proved in solemn form. We make no order as to costs.

Appeal allowed.

J. V. W.

Before Mr. Justice Ghose and Mr. Justice Rampini.

1894 *Jan.* 31.

HURRI PERSHAD CHOWDHRY (DECREE-HOLDER) *v.* NASIB SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Limitation Act (XV of 1877), *Schedule II, Article* 179—*Execution of decree—Decree for payment of money by instalments on specified dates—Default in payment of first instalment—Right of waiver of default—Payment not certified to Court—Civil Procedure Code (Act VIII of* 1859), *s.* 206 (*Art. XIV of* 1882), *s.* 258.

A decree dated 22nd Cheyt 1295 (18th April 1882) provided "that the defendants do pay the decretal money as per instalments given below, otherwise the plaintiff will have the power to cancel the instalments and realize the entire amount." The first instalment was made payable on 30th Cheyt 1295 (26th April 1888), and the other six instalments on the 30th of the months of Magh and Bysack in the three following years. In an application made on 9th February 1892 for execution of the decree, the decree-holder stated that only the first instalment had been paid, and asked for execution for the amount remaining due under the decree, and the judgment-debtors denied having paid any of the instalments. *Held*, that the clause in the decree

* Appeal from appellate order No. 369 of 1892, against the order of F. W. Badcock, Esq., District Judge of Bhagalpur, dated the 30th of July 1892, affirming the order of Babu Prayag Nath Munsif of that district, dated the 30th of May 1892.

to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realize the full amount, was not intended to give him the option of waiving the default if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount would become exigible: if, therefore, the first instalment had not been paid, the application for execution, not having been made within three years from the date when the whole amount became due, was barred by Article 179 of Schedule II of the Limitation Act; (*Chandra Kamal Das* v. *Bissessurree Dassia* (1) dissented from); and the case was remanded for final decision of the question whether or not payment of the first instalment had been made.

Chenibash Shaha v. *Sridam Mandal* (2), *Asmutullah Dalal* v. *Kally Churn Mitter* (3), *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (4), *Judistir Patro* v. *Nobin Chandra Khela* (5), *Ram Culpo Bhattacharji* v. *Ram Chunder Shome* (6), *Mon Mohun Roy* v. *Durga Churn Gooee* (7), and *Bir Narain Panda* v. *Darpa Narain Prodhan* (8), referred to.

Held, further, that although under the provisions of section 258 of the Civil Procedure Code the payment in question, if made, could not be recognised as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred. There is no material difference in this respect between section 258 of the Civil Procedure Code (Act XIV of 1882) and section 206 of the old Code (Act VIII of 1859) on which the case of *Fakir Chand Bose* v. *Madan Mohan Ghose* (9) was decided.

THIS was an application for execution of the following decree dated 18th April 1888 (22nd Cheyt Sani 1295) made as the result of a compromise in a suit brought on a mortgage bond:—

"It is ordered and decreed that according to the petition of compromise a decree be passed in favour of the plaintiff for Rs. 380, and that the defendants do pay the decretal money as per instalments given below, otherwise the plaintiff will have the power to cancel the instalments and realize the entire amount with interest of defaulted instalments at the rate of Rs. 2 per cent. per mensem from the date of the decree, to that of realization, from the mortgaged and other properties and persons of the defendants; and the defendants will lose their right to redeem the mortgage, and the mortgaged property will be sold by auction, and if the sale proceeds

(1) 13 C. L. R., 243.
(2) I. L. R., 5 Calc., 97.
(3) I. L. R., 7 Calc., 56.
(4) I. L. R., 9 Calc., 857.
(5) I. L. R., 13 Calc., 73.
(6) I. L. R., 14 Calc., 352.
(7) I. L. R., 15 Calc., 502.
(8) I. L. R., 20 Calc., 74.
(9) 4 B. L. R., F. B., 130.

1894

HURRI PERSHAD CHOWDHRY v. NASIB SINGH.

will not cover the entire amount due to the plaintiff, then the defendants will be personally liable for the remaining amount of this decree:—

	Rs.
Instalments—	
30th Cheyt Sani 1295	100
30th Magh 1296	60
30th Bysack 1296	40
30th Magh 1297	60
30th Bysack 1297	40
30th Magh 1298	50
30th Bysack 1298	30
Total ...	380"

The application for execution was made on 9th February 1892, and stated that only the first instalment had been paid, and asked for execution for the remaining instalments with interest as decreed. The judgment-debtors denied that they had paid any instalment, and objected to execution of the decree being allowed on the ground that it was barred by lapse of time.

The question, therefore, was whether the first instalment had been paid. As to this the Munsif said—"If not, it is amply clear on the authorities that limitation began to run when the first default was made, and that therefore the present petition made more than three years after that date is out of time." He referred to *Judhistir Patro* v. *Nobin Chandra Khela* (1) and *Mon Mohun Roy* v. *Durga Churn Gooee* (2), and finding on the evidence that the first instalment had not been paid, he held that execution of the decree was barred. He refused to receive in evidence an account book which the decree-holder, he observed, had not produced until too late.

The District Judge on appeal confirmed this decision: he said—"On the facts of the case I think the Munsif has given good reason for his finding. The account book should have been filed at the time of applying for execution as the decree-holder relied on it to prove payment. The plea of non-payment was one which the decree-holder could have anticipated, and I cannot consider that section 63 of the Civil Procedure Code applies. As regards

(1) I. L. R., 13 Calc., 73. (2) I. L. R., 15 Calc., 502.

the second point the rulings quoted by the Munsif are clearly in favour of the judgment-debtors. The appeal is dismissed with costs and interest at 6 per cent."

The decree-holder appealed to the High Court.

Babu *Grija Sunker Mozumdar* for the appellant.

Babu *Monmotho Nath Mitter* for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows :—

This is an appeal against a decree of the District Judge of Bhagalpur, affirming the judgment of the Munsif of Banka. The appellant before us applied to the Munsif on the 9th February 1892 for execution of a decree obtained by him against the respondents on the 18th April 1888. He had sued the respondents on a bond, and a compromise had been effected, making the sum claimed payable by instalments. This compromise was given effect to in the decree of the 18th April 1888. The first instalment was payable on the 26th April 1888, and admittedly more than three years have elapsed between that date and the date of the application to the Munsif for execution. But the dates of payment of the other instalments are within three years of the date of the application to the Munsif. The decree of the 18th April 1888 provides that if the instalments are not paid on the dates fixed for their payments, then "the plaintiff will have the power to cancel the instalments and realize the entire amount with interest."

The appellant when he applied to the Munsif for execution alleged that the first instalment had been paid, and applied for execution of his decree in respect of the other instalments. The judgment-debtors, however, denied that they had paid any instalment, and contended that the execution of the decree was accordingly barred by limitation.

The Munsif found both these points in favour of the judgment-debtors, and, as already said, the District Judge affirmed his findings. Hence this appeal. Before us, it is urged (1) that the Munsif wrongly refused to admit in evidence an account book which the decree-holder wished to file in support of his plea of payment of the first instalment; and (2) that as by the terms of

1894

HURRI PERSHAD CHOWDHRY v. NASIB SINGH.

the decree of the 18th April 1888, on non-payment of any instalment he has the power, but is not obliged, to treat the whole decretal amount as due, the rulings cited by the Munsif, *viz.*, *Judhistir Patro* v. *Nobin Chandra Khela* (1) and *Mon Mohun Roy* v. *Durga Churn Gooee* (2) are inapplicable, and, therefore, that whether the first instalment has been paid or not, the execution of the decree for the remaining instalments is not barred.

We will deal first with the second of these contentions. In support of this plea, the learned pleader for the appellants relies on the case of *Chandra Kamal Das* v. *Bisssesurree Dassia* (3), and has also cited the cases of *Asmutullah Dalal* v. *Kally Churn Mitter* (4), *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (5), and *Ram Culpo Bhattacharji* v. *Ram Chunder Shome* (6). But all these cases have been considered in the second of the cases referred to by the Munsif, *viz.*, *Mon Mohun Roy* v. *Durga Churn Gooee* (2). In this case it is said that the rule to be deduced from all the cases is "that when a decree or order makes a sum of money payable by instalments on certain dates, and provides that on default of payment of one of the instalments, the whole of the money shall become due and payable, and be recoverable in execution, then under Article 179 of the Limitation Act, as under corresponding articles in earlier Acts, limitation commences to run when the first default is made." It is further said "that there has been engrafted on this general rule an exception to the effect that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred. The authorities are quite consistent with one another. The only case which seems to me to conflict in any way with these cases is the case of *Chandra Kamal Das* v. *Bissessurree Dassia* (3)." (This is the case relied on by the learned pleader for the appellant before us)—"There it does appear to me to have been held that although in a case similar to the present

(1) I. L. R., 13 Calc., 73.
(2) I. L. R., 15 Calc., 502.
(3) 13 C. L. R., 243.
(4) I. L. R., 7 Calc., 56.
(5) I. L. R., 9 Calc., 857.
(6) I. L. R., 14 Calc., 352.

defaults had occurred and no subsequent payment had been made in respect of the *kists* in default, it was still open to the creditor to say that the provision making the whole sum payable on default of payment of one instalment was one only for his protection, and that he might afterwards waive it and put it out of the way as regards the period of limitation. This seems to me irreconcilable, if I correctly understand it, with the current of decisions on the subject, and especially inconsistent with the decision in *Chenibash Shaha* v. *Sridam Mandal* (1). I am disposed to think that there must have been some peculiarity in the case beyond what appears in the report, because the learned Judges cite as an authority in support of their view the case of *Asmatullah Dalal* v. *Kally Churn Mitter* (2) which appears to me, as I understand it, to be an authority for the contrary view."

It is clear then that the learned Judges who decided *Mon Mohun Roy* v. *Durga Churn Gooee* (3) did not approve of the decision in *Chandra Kamal Das* v. *Bissessurree Dassia* (4) and dissented from the view therein expressed as strongly as it was possible for them to do. As the ruling in this case stands alone and is contrary to the current of decisions in respect of this matter, we are unable to follow it. We cannot hold that mere abstinence from suing can amount to waiver, or that there can be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment. Nor do we think that any distinction can be drawn, as has been attempted in this case to be drawn, between a case in which it is provided that on non-payment of an instalment the whole amount *shall become due*, and one in which it is provided that on non-payment of an instalment the whole amount *may be sued for*. There seems no reason why limitation should begin to run in the one case and not in the other. Finally, we may say that the clause in the decree on which the appellant relies in this case to the effect that on non-payment of an instalment it shall be in the power of the decree-holder to realize the full amount appears to us to have probably never been intended to give the decree-holder the option of waiving the default if he pleased, and that it implied

(1) I. L. R., 5 Calc., 97.
(2) I. L. R., 7 Calc., 56.
(3) I. L. R., 15 Calc., 502.
(4) 13 C. L. R., 243.

1894

HURRI PERSHAD CHOWDHRY v. NASIB SINGH.

nothing more than the usual condition that on non-payment of an instalment the whole decretal amount would become exigible.

Another case has been cited before us, *viz.*, *Bir Narain Panda* v. *Darpa Narain Prodhan* (1). The terms of the bond sued on in that case are very similar to those of the present appellant's decree, for the bond provided that on default of payment of one instalment, the plaintiff should be competent to take out execution and realize the full amount. The decree-holder, as in this case, alleged payments, which were found not to have been made, and applied for execution of the whole decree. He did not, as pointed out in the judgment in this case, "make any application to be allowed to execute the decree in respect of the instalments that fell due within three years before the date of his application. But the Court of first instance," it is said, "in its judgment noticed the point as to whether such application, if it had been made, would not be barred, and it held upon the authority of the case of *Mon Mohon Roy* v. *Durga Churn Gooee* (2) that an application of that kind would be barred." The contention was, however, raised in the High Court, and the pleader for the appellant in this case has pressed upon our attention the passage in that judgment in which it is said—" But it has been argued that though that was so, yet, as the proviso authorising the decree-holder to execute the decree in the event of default in the payment of any instalment was a provision for his benefit, it was competent to him to waive the benefit of the proviso and claim execution only in respect of the instalments that were not barred." But this can scarcely be said to be in favour of the present appellant, for though no doubt the Court did not say that this plea would not be a good one, if raised, but merely contented itself with observing that it had not been raised in the Courts below and could not have been raised in the circumstances of the case, yet it did not in any way express approval of this doctrine. Hence, taking into consideration the state of the authorities on this point, we are not prepared to admit that there is any force in the contention of the appellant that, owing to the terms of the decree, he had a right to waive any default that may have been made in payment of the first instalment, and that even if he merely abstained from taking out

(1) I. L. R., 20 Calc., 74. (2) I. L. R., 15 Calc., 603.

execution on such a default being made limitation did not necessarily begin to run against him.

We now turn to the first of the appellant's pleader's contentions. We are of opinion that the Court of first instance should not have refused to admit in evidence the account book which the decree-holder wished to produce, and prove, when his first witness was under examination. He wished to produce this account book to disprove the plea of non-payment set up by the judgment-debtors. He could not be expected to have anticipated this plea at the time of his presenting his application for execution, and there is nothing which makes it necessary for him to file with his application all documents which on an objection to execution being raised by the judgment-debtors it may be necessary for him to produce in court to repel that objection. The learned pleader for the judgment-debtors argues that under the last clause of section 258, Civil Procedure Code, as the payment in question was not certified to the court, the decree-holder was not entitled to prove it. We are, however, of opinion that though under the provisions of section 258, Civil Procedure Code, the payment in question, if made, could not be recognized as a payment or adjustment of the decree, yet it was and is competent to the decree-holder to prove this payment for the purpose of showing that the period of limitation did not begin to run in this case until the default made in respect of the second instalment. See the Full Bench case of *Fakir Chand Bose* v. *Madan Mohan Ghose.* (1) It is true that this case refers to the provisions of section 206 of Act VIII of 1859, but they do not appear to us to be on this point materially different from those of section 258 of the present Code. We are, therefore, unable to agree with the ruling in the case of *Mithu Lal* v. *Khairati Lal* (2) decided by Tyrrell, J., who appears to have considered that in consequence of the alteration in the wording of the section, the Full Bench ruling of this Court cited above ceases to have any weight.

We, therefore, consider that this case must be remanded to the Court of first instance with directions to admit in evidence the account book, which the decree-holder wished to produce, and after giving an opportunity for its being proved that it will come to a

(1) 4 B. L. R., F. B., 130. (2) I. L. R., 12 All., 569.

1894

HURRI PERSHAD CHOWDHRY v. NASIB SINGH.

finding as to the alleged payment of the first instalment. It may be that if the account book be found genuine, the evidence as to the payment already given will present a different aspect.

If the alleged payment be found not to have been made, then in accordance with our decision on the appellant's first contention, the application for execution should be rejected. If the alleged payment be found to have been made, the decree-holder's application should be allowed.

Costs to abide the result.

Case remanded.

J. V. W.

Mr. Justice Ghose and Mr. Justice Rampini.

1894 *Jan.* 23.

RAMESWAR MAHTON AND OTHERS (DECREE-HOLDERS) *v.* DILU MAHTON AND OTHERS (JUDGMENT-DEBTORS).*

Munsif, Jurisdiction of—Decree containing order for ascertainment of mesne profits from date of suit to date of recovery of possession—Effect on jurisdiction of such mesne profits added to amount of decree exceeding jurisdiction of the Munsif.

A suit, valued at Rs. 950, was brought in the Munsif's Court to recover possession of certain lands on the ground of illegal dispossession. No mesne profits up to date of suit were claimed, but the plaint prayed that such mesne profits from date of suit to recovery of possession, as might be ascertained in execution of decree, should be awarded to the plaintiff. The Munsif gave a decree in accordance with the prayer of the plaint. The plaintiff then asked that the mesne profits might be assessed, and in his petition he roughly estimated them at Rs. 1,595, and thereupon it was held both by the Munsif, and on appeal by the District Judge, that the Munsif had no jurisdiction, as he could not give a decree for more than Rs. 1,000. *Held*, on appeal to the High Court, that the Munsif had jurisdiction to ascertain the mesne profits, and to give effect to the order made in his decree in the suit, notwithstanding that the amount of such mesne profits, when added to the value of the suit, might come to a sum in excess of the pecuniary jurisdiction of his Court.

* Appeal from appellate order No. 31 of 1893, against the order of J. Tweedie, Esquire, District Judge of Patna, dated the 9th of November 1892, affirming the decree of Babu Chandra Kumar Roy, Munsif of that district, dated the 31st of August 1892.

THE suit out of which this appeal arose was brought in the Court of the Munsif of Patna for recovery of possession of land which was valued at Rs. 950 and for mesne profits from the date of suit to the date of recovery of possession. The suit was instituted on 29th September 1891, when the pecuniary jurisdiction of the Munsif's Court was Rs. 1,000. No fixed amount of mesne profits was estimated in the plaint, but the plaint prayed that the amount might be determined at the time of execution of the decree.

The Munsif on 15th March 1892, when the jurisdiction of the Munsif's Court had been raised to Rs. 2,000, gave a decree for the plaintiffs for the amount sued for; the amount of mesne profits being left, as prayed, to be determined at the time of executing the decree. The plaintiffs subsequently asked the Court to ascertain and assess the mesne profits from the date of the suit, and estimated them in their petition at Rs. 1,595-10-3.

The defendants objected that the Court had no power to ascertain and assess the amount claimed as being in excess of its jurisdiction at the date of the institution of the suit.

The Munsif held that under s. 45 of the Code of Civil Procedure his pecuniary jurisdiction was limited to the jurisdiction he had when the suit was brought, *viz.*, Rs. 1,000; and that as a decree has already been made for Rs. 950 he had jurisdiction only to allow mesne profits in an amount not exceeding Rs. 50.

This decision was, on appeal by the plaintiffs, upheld by the Judge.

The plaintiffs appealed to the High Court.

Babu *Karuna Sindhu Mukerjee* for the appellants.

Babu *Lal Mohan Das* for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

This appeal arises out of an application made by the decree-holder for ascertainment and recovery of mesne profits in terms of an order made in the decree passed between the parties.

It appears that the suit, which was instituted in the Munsif's Court, was for recovery of possession of certain lands upon the ground of illegal dispossession, and it was valued at Rs. 950,

1894

RAMESWAR MAHTON v. DILU MAHTON.

being the value of the lands in question. No mesne profits were claimed up to date of suit, there being perhaps none to be recovered, the suit being instituted shortly after the dispossession, but it was prayed in the plaint that the mesne profits from the date of suit to that of recovery of possession as might be ascertained in execution of the decree should be awarded to the plaintiff. And a decree was passed in accordance with the prayer of the plaintiff.

The decree-holder presented his petition to the Munsif, asking that the amount of mesne profits might be assessed, and he roughly estimated it at Rs. 1,595, and thereupon a question of jurisdiction was raised by the defendant; and both the Court of first instance and the District Judge on appeal have held that the Court of the Munsif has no authority to determine in this case the amount of mesne profits at any sum exceeding Rs. 50, the pecuniary jurisdiction of that Court being limited to Rs. 1,000 only, and the value of the claim in the suit being Rs. 950.

It appears to us that the arguments used by the lower Courts, and those that have been pressed upon us by the learned Vakil for the respondents, might perhaps apply to a proceeding for the recovery of mesne profits accruing before the date of the institution of the suit in which the decree was made. In such a case, a cause of action for the recovery of mesne profits arises at the time of the suit, and such a cause of action may or may not be joined with a suit for the recovery of the immoveable property (see sections 44 and 45 of the Code of Civil Procedure); and if such mesne profits are claimed in the same suit (the amount being only approximately given in the plaint) the Court may under section 212 of the Code either determine the amount by the decree itself, or may pass a decree for the property, and direct an enquiry into the amount of mesne profits, and dispose of the same on further orders. In such a case, the final decree in the cause has to be made when the amount of mesne profits, if left undetermined at the time of the preliminary decree for the immoveable property, is ascertained. But even in such a case it is extremely doubtful whether, if the amount of mesne profits determined on further orders being added to the value of the property itself, as given in the plaint, exceeds the pecuniary jurisdiction of the Court in which the suit

was brought, the said Court would have no jurisdiction to make the final decree in the cause. But however that may be, where no cause of action for mesne profits has arisen on the date of the institution of the suit, and where none can therefore be claimed, as in this case, the Court may provide in the decree for the payment of mesne profits from the date of suit until the delivery of possession or until the expiration of three years from the date of decree (whichever event first occurs) with interest thereupon. We do not think that in such a case, at least, the Court which has to determine the amount of mesne profits should be guided in the matter of jurisdiction by the amount which may be approximately claimed by the decree-holder in his application, or which may be determined on investigation. The amount of mesne profits would depend upon the length of time during which the defendant, notwithstanding the decree, may choose to keep the plaintiff out of possession. It may happen that the defendant delivers up possession shortly after the decree, and in that event the amount recoverable by the plaintiff would be small and might fall within the pecuniary jurisdiction of the Court, while, if the defendant does not so deliver up possession, the amount may be much larger and exceed (the value of the suit being added to it) the jurisdiction of the Court. In most cases, the Court would not be in a position to say whether it has jurisdiction or not until the enquiry into the amount of mesne profits has been completed; and it is not probable that the Legislature should have intended that after all the enquiry has been made, the Court should be deprived of jurisdiction, or should not be permitted to order payment of a larger amount than what, added to the value of the suit, would fall within its pecuniary jurisdiction, and that the plaintiff should either be driven to another Court for the recovery of the amount exceeding the sum awarded by the Court executing the order, or should have no remedy at all in that respect. In the case of *Pirthi Chand v. Roy Radha Kishan* (1), decided by a Full Bench of this Court, the learned Judges observed as follows:—"The object of enacting section 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits, and for this purpose they empowered the Courts to give, with the possession of the real property, such *wasilat* as the plaintiff would be entitled to

(1) I. L. R. 19 Calc., 132.

1894

RAMESWAR MAHTON v. DILU MAHTON.

by law. The proceedings, therefore, in determining the amount of *wasilat* are not proceedings in execution of a decree in regard to any fixed amount, but merely a continuation of the original suit, and carried on in the same way as if a single suit were brought for mesne profits by itself." And it appears to us that if the Munsif had jurisdiction to try the original suit, he has equally jurisdiction to give effect to the order he made in the decree as regards mesne profits.

The learned Vakil for the respondent in the course of his argument relied upon certain observations of a Divisional Bench of this Court in *Mohini Mohan Das* v. *Satis Chandra Roy* (1), but it will be observed that the question which the learned Judges had there to decide was as to the *forum* of appeal, and not as regards the jurisdiction of the Original Court.

Upon the whole, we think that the Munsif had jurisdiction in this case to determine the amount of mesne profits claimable by the decree-holder under the order passed in the decree and to award such sum as may be found justly due to him.

The appeal will be allowed with costs and the case remitted to the Court of first instance for carrying out the order which we have just made.

J. V. W. *Appeal allowed.*

Before Mr. Justice Ghose and Mr. Justice Rampini.

1894 *February.*

GOPAL CHUNDER MITRA (AUCTION-PURCHASER, DEFENDANT No. 7) *v.* RAM LAL GOSHAIN (PLAINTIFF) AND OTHERS (JUDGMENT-DEBTORS), DEFENDANTS Nos. 1 to 6.*

Bengal Tenancy Act (VIII of 1885), *s.* 173—*Sale for arrears of rent—Purchase by benamidar for judgment-debtor—Sale void or voidable—Suit to set aside sale—Proper Court to decide whether sale should stand or not.*

Where a sale takes place under the Bengal Tenancy Act in execution of a decree for arrears of rent, and the purchaser is found to be a mere *benamidar* for the judgment-debtor,—*Held*, in a suit to set aside the sale on that

* Appeal from appellate decree No. 1293 of 1892, against the decree of Babu Kedar Nath Chatterjee, Subordinate Judge of Bankura, dated the 5th of May 1892, reversing the decree of Babu Pran Krishto Roy, Munsif of Khatra dated the 6th of October 1890.

(1) I. L. R. 17 Calc., 704.

ground, that on the wording of section 173 the sale was only voidable, and not absolutely void: that section leaves it in the discretion of the Court to set aside the sale or not as it thinks fit.

Under that section the proper Court to determine whether the sale should stand or not is the Court that held the sale.

THE plaintiff was the purchaser, at a sale in execution of a decree, of a tenure originally owned by the defendants Nos. 4, 5 and 6, of which tenure the defendants 1, 2 and 3, Messrs. Gisborne & Co., were the superior landlords, but the plaintiff's name was not registered on the *sherista*. Messrs. Gisborne & Co. sued defendants 4 to 6 for rent, and obtained a decree in execution of which they caused the tenure to be sold, and the tenure was purchased by the defendant No. 7. The plaintiff then applied under section 173 of the Bengal Tenancy Act to the Court to have the sale set aside, on the ground that no sale proclamation had been published, and that the property had on that account been sold at much less than its proper value; and that defendant No. 7 was a mere *benamidar* for the judgment-debtor, defendant No. 4. This application was dismissed. The plaintiff thereupon brought the present suit to have the sale set aside, alleging that the rent decree and the proceedings that led to the sale were fraudulent and collusive, and that the defendant No. 7 was merely a *benamidar* for the judgment-debtor, defendant No. 4.

The defence was that the suit was not maintainable; that there was no fraud or collusion; and that the defendant No. 7 was not a *benamidar* for the judgment-debtors, but purchased the tenure on his own account; and issues were raised, 1st, whether defendant No. 7 was a *benamidar* for defendant No. 4; 2nd, whether the decree and sale which followed it were collusive and fraudulent, and whether the plaintiff had any right to have the sale set aside.

The Munsif found that the defendant No. 7 was a *benamidar* for the judgment-debtor, but that this question had been already decided adversely to the plaintiff in his application in the execution proceedings to set aside the sale, and it could not, therefore, be raised again in a regular suit. He also found that there had been no fraud, and dismissed the suit.

The Subordinate Judge, on an appeal by the plaintiff, held that the order in the execution case did not preclude the plaintiff

1894

GOPAL CHUNDER MITRA v. RAM LAL GOSHAIN.

from raising the question in this suit whether defendant No. 7 was or was not a mere *benamidar* for the judgment-debtor; and agreeing with the Munsif that he was merely a *benamidar*, he allowed the appeal and decreed the suit against the defendant No. 7 alone.

From this decision the defendant No. 7 appealed to the High Court.

Babu *Nalini Ranjan Chatterjee* for the appellant.

Babu *Kishori Lal Sarkar* and Babu *Promotho Nath Sen* for the respondents.

The arguments and cases cited are sufficiently stated in the judgment of the Court (GHOSE and RAMPINI, JJ.), which was as follows:—

This was a suit to set aside the sale of a tenure held in execution of a decree for arrears of rent and to recover possession of a two-thirds share thereof.

It appears that the tenure in question belonged to the defendants 4, 5 and 6. In execution of a money decree against the defendants 4 and 5, their interest in a two-thirds share of the tenure was sold and purchased by the plaintiff. The plaintiff, however, did not get his name registered in the zemindar's *sherista*, and the result was that when a default was made in the payment of the rent due to him, the zemindar brought his suit against the recorded tenure-holders only, the defendants 4, 5 and 6; and, having recovered a decree, caused the tenure to be sold, and at this sale the defendant No. 7 became the purchaser. The plaintiff subsequently made an application to the Court, which had held the sale, for setting it aside upon the ground of fraud and irregularity in the publishing and conducting the sale, and also upon the ground that the ostensible purchaser at the sale was but a *benamidar* for the judgment-debtor. The Court, however, rejected his application, and confirmed the sale, being of opinion that the allegations made by him were not substantiated. The plaintiff then brought the present suit for the purpose, as already mentioned, of having the sale set aside, and for recovery of possession of a two-thirds share of the tenure, upon the ground that the decree in the rent suit was fraudulent, and the sale in execution thereof irregular, and also that the purchaser at the sale was but a *benamidar* for the defendant No. 4.

The Court of first instance dismissed the plaintiff's case, being of opinion that although the defendant No. 7 was a *benamidar* for the judgment-debtor, still no case of fraud had been made out, and that the order of the execution Court was conclusive between the parties.

On appeal, the Sub-Judge has set aside the judgment of the Court of first instance and decreed the plaintiff's suit, upon the simple ground that the defendant No. 7 is but a *benamidar* for the judgment-debtors. This we understand to refer to the defendant No. 4; for the case of the plaintiff was that defendant No. 4 purchased the property in the *benami* of defendant No. 7, and the issue laid down in the Court of first instance had reference to the defendant No. 4 only. The Sub-Judge has further expressed an opinion that the plaintiff being no party to the suit in which the decree was made, was not precluded from bringing this suit.

The present appeal is by the defendant No. 7.

The sale took place under the Bengal Tenancy Act, and the main question that has been discussed before us is as to the true construction of section 173 of that Act, having regard to the fact found by the Court below that one of the judgment-debtors has purchased the property in the *benami* of the appellant. That section runs as follows :—

"(1) Notwithstanding anything contained in section 294 of the Code of Civil Procedure, the holder of a decree, in execution of which a tenure or holding is sold under this chapter, may, without the permission of the Court, bid for or purchase the tenure or holding.

"(2) The judgment-debtor shall not bid for or purchase a tenure or holding so sold.

"(3) When a judgment-debtor purchases by himself or through another person a tenure or holding so sold, the Court may, if it thinks fit, on the application of the decree-holder or any other person interested in the sale, by order set aside the sale, and the costs of the application and order and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the judgment-debtor."

1894

GOPAL CHUNDER MITRA v. RAM LAL GOSHAIN.

Upon the wording of the section, the question that arises is whether the sale is absolutely void, or is it only voidable. And there is a further question whether the Court which holds the sale is the only Court competent to determine whether the sale should stand or not.

Referring in the first place to the corresponding section in the Civil Procedure Code, *viz.*, section 294, which prohibits a decree-holder from purchasing, the words are that "no holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property," and in which the last paragraph is in the same words (substituting the word "decree-holder" for "judgment-debtor") as the corresponding paragraph in section 173 of the Bengal Tenancy Act, it has been held in several cases in Bombay and Madras that the sale is not *ipso facto* void, but only voidable, if the decree-holder purchases without the sanction of the Court [see *Javherbai* v. *Haribhai* (1), *Chintamanrav Natu* v. *Vithabai* (2)]. And it has been held in a case in this Court, *Mathura Das* v. *Nathuni Lall Mahta* (3), that if a decree-holder purchases a property without the permission of the Court, it is a matter of irregularity in connection with the sale.

If the law has been correctly laid down in these cases, there can be very little doubt that when a judgment-debtor, as in section 173, purchases the property sold, the sale is not absolutely void, but may be avoided if the Court so thinks fit; and we do not think that the slight difference in the phraseology of the two sections prescribing the prohibition makes any difference as to the intention of the Legislature. It seems to us that when section 173 prescribes that upon an application being made by a party interested, the Court may by order set aside the sale "if it thinks fit," it means to leave it to the discretion of the Court, with reference to the facts of each particular case, either to set aside the sale or not. And if such a discretion is left to the Court holding the sale, it is obvious that the sale is not absolutely void, but only voidable.

(1) I. L. R., 5 Bom., 575. (2) I. L. R., 11 Bom., 589.

(3) I. L. R., 11 Calc., 731.

Our attention has been called to two cases in this Court,—*Rukhinee Bullubh* v. *Brojo Nath Sircar* (1) and *Mahomed Gazee Chowdhry* v. *Ram Loll Sen* (2). In the first-mentioned case, the sale was under Act X of 1877, which did not contain any provision giving power to the Court to set aside the sale, as in Act XIV of 1882. In the other case, it was the decree-holder who sought to enforce his purchase by suit; and it was shown that he had applied for permission to bid, and the permission had been refused, and he then purchased the property in the *benami* of another person; and this Court held that he was guilty of an abuse of the process of the Court, and accordingly dismissed his claim.

Our attention has also been drawn to the prohibition that is contained in the *putni* Regulation against a defaulting *putnidar* purchasing at the *putni* sale, but we do not think that the language of that Regulation, or the decisions quoted before us as bearing upon it, help us in determining the question as to the construction of section 173 of the Bengal Tenancy Act.

But is the Court holding the sale the only Court competent to determine whether the sale should stand or not, and does not a separate suit lie for the same purpose?

If the question were between the parties to the suit in which the decree was made, there could be very little or no doubt, having regard to section 244 of the Civil Procedure Code, that a separate suit would not lie; but in this particular case the plaintiff was no party to the suit, and therefore he is not debarred by section 244, Civil Procedure Code, from bringing a separate suit with a view to have it declared that the sale is absolutely bad, and has not passed any title to the purchaser. He sought to do so upon the ground of fraud, and if this had been substantiated, the Court might have declared that the sale was infructuous and passed no title to the defendant: but this ground was not made out. As to the other ground, *viz.*, as to the purchase being *benami*, it has no doubt been proved; but still the question is whether the Court, other than the Court holding the sale, can declare the sale to be bad upon that ground, and can set it aside accordingly.

(1) I. L. R., 5 Calc., 308. (2) I. L. R., 10 Calc., 757.

1894

GOPAL CHUNDER MITRA v. RAM LAL GOSHAIN.

Section 173 prescribes both the prohibition and the remedy, and we are inclined to think (though the matter is not free from doubt) that the section is complete in itself. And it will be observed that it contemplates a re-sale, upon the sale which had already taken place being set aside, and any deficiency in the price and all expenses upon such re-sale being payable by the judgment-debtor. This indicates that the Court holding the sale is the proper Court to determine whether the sale should stand or not. If it determines the question in the negative, it has to put up the property again to sale. A Court, other than the execution Court, is not in a position to do so.

As bearing upon this question, we were pressed with an observation in the case *of Mahomed Gazee Chowdhry* v. *Ram Lall Sen* (1), already referred to, with reference to section 294 of the Civil Procedure Code; and that is to the effect that the law provides two remedies—one by a regular suit, and the other by summary application to have the sale set aside. But it will be observed that this observation was based mainly upon the fact that, in the Code of 1877 the first paragraph of section 294 prohibiting a purchase by the decree-holder existed without the last paragraph, which was subsequently introduced into the Code, providing that upon an application being made by any party interested, the sale might be set aside. The said observation may be correct (but we express no opinion) with reference to a sale under the Civil Procedure Code, but it can hardly be applicable to a sale under the Bengal Tenancy Act, where the Legislature has, once for all, prescribed both the prohibition and the remedy.

It happens, however, in this case that the suit has been instituted in the same Court as held the sale, and the plaint may, therefore, be well regarded as an application within the meaning of section 173 to set aside the sale. But that Court did not see fit to set aside the sale; and if we were called upon to exercise our discretion in the matter, we should not be prepared to hold that the sale should be cancelled. The defendant No. 4 who has purchased the property, though nominally a judgment-debtor, had no existing interest at the time of the previous suit and the sale; for his rights had then already passed to the plaintiff;

(1) I. L. R., 10 Calc., 757.

1894

GOPAL CHUNDER MITRA v. RAM LAL GOSHAIN.

and therefore there was nothing improper in his making the purchase. And it would appear upon the evidence noticed by the Munsif that the plaintiff was aware of the sale and was watching the proceedings to see whether the judgment-debtors would pay up the decree. That being so, we do not think that this is a case in which we should direct that the sale be set aside.

Upon all these grounds we are of opinion that the decree of the Court below should be set aside and that of the Court of first instance restored. This order carries costs in all Courts.

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

YAMIN-UD-DOWLAH AND OTHERS (PLAINTIFFS) v. AMED ALI KHAN AND OTHERS (DEFENDANTS).*

1894 *March* 14.

Practice—Dismissal of suit—Staying Proceedings—Application to restrain Receiver parting with funds, pending appeal—Power of Court.

Under the Code of Civil Procedure, once a suit has been dismissed the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs.

An application therefore made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the receiver may be restrained from parting with funds in his hands pending an appeal, cannot be granted.

ON the 6th April 1893, a consent decree was passed by Mr. Justice Norris in a suit brought for a declaration, (1) that the will of Nawab Ikbalud Dowlah, deceased, was invalid and inoperative under Mahomedan law, (2) that the plaintiffs in the suit were the lawful heirs of the deceased; and in the alternative, that the will might be construed and a scheme framed thereunder. In that suit a receiver was appointed.

On the 9th September 1893, a suit was filed by some of the heirs of the deceased who alleged that they were unaware of

* Original Civil Suit No. 614 of 1893.

1894

YAMIN-UD-DOWLAH v. AHMED ALI KHAN.

the terms of the compromise, that they never gave instructions to the attorney to consent to the decree, and were therefore not bound by it, and prayed that the consent decree might be set aside, and that their suit might be taken as supplemental to the former suit in which the consent decree was passed, and that execution of that decree might be stayed and an injunction granted restraining the receiver from parting with the properties in his hands.

This suit was dismissed by Mr. Justice Sale, and the injunction which had been granted became therefore dissolved. The plaintiffs thereupon applied to that learned Judge for an order on the receiver staying him from parting with the funds in his hands pending an appeal; the appeal at that time had not been filed, the filing thereof having been delayed for the purposes of the application.

Mr. *Phillips* for the plaintiffs :—I am not applying for stay of execution, as execution has not been asked for by the decree-holders. The Code makes no provision for such an application as this, but the case being still before the Court, no appeal being filed, the application must be made in this Court. It is left to the Court, as a Court of equity, to deal with it. Stay of execution does not arise when a suit has been dismissed; it only arises where a decree has been made. What is to be done when a suit involving the title to property is dismissed? What is to be done during the time necessary to prepare an appeal? The Court must have some means of placing the property out of jeopardy during this time and up to the decision on appeal. Section 545 of the Civil Procedure Code gives an analogous power to stay execution; the present is a stronger case than that of a proceeding in execution of decree; it is more summary. I am still asking the Court to adjudicate upon the suit, and I can do so till the time for filing an appeal has expired. I have stated that I intend to appeal, and the only question is whether I am to be driven to apply to the Appellate Court. The original decree is not final so long as the opportunity to appeal remains. Section 503 is wide enough to allow the Court to appoint a receiver during the whole of the litigation, and I am entitled upon principles of equity to have the property kept safe. The sole question is whether the

consent decree is good, and I submit that the Court ought to withhold the property until it is decided whether the decree is good.

Mr. *Pugh* (with him Mr. *Garth*) for the principal defendants. This is really an application to prevent the paying of the costs of the suit. The consent decree is a final decree till set aside; "final decree" is used as distinguishing it from one of an interlocutory character. The Court would have power to act under section 545, but that power is not invoked. It has been decided in this country that after a suit is dismissed an injunction comes to an end—*Moheeooddeen* v. *Ahmed Hossein* (1), *Gossain Money Puree* v. *Guru Pershad Singh* (2).

I rely on *Wilson* v. *Church* (3). *Otto* v. *Lindford* (4) refers to a stay of proceedings for costs pending appeal. *Polini* v. *Gray* (5) is distinguishable as being a case under special and peculiar circumstances.

Mr. *Jackson*, Mr. *Bonnerjee*, and Mr. *T. A. Apcar*, for others of the defendants.

SALE, J.—This suit, the object of which was to set aside the decree in a former suit between the same parties purporting to be a consent decree, was dismissed with costs, it being held that the compromise embodied in the decree is binding upon all the parties to the suit. An application is now made by the plaintiffs in this suit for an order to prevent the disposal, pending an appeal, of funds in the hands of the receiver appointed in the former suit. The question which I have to consider is whether, under the circumstances, I have jurisdiction to make the order asked for.

In the case of *Wilson* v. *Church* (3), where an action had been dismissed by a Divisional Court, it was held by Sir George Jessel, M.R., with the concurrence of Brett and Cotton, LL.J., that that Court had no jurisdiction to entertain an application for an injunction to prevent funds in the hands of trustees from being parted with pending an appeal, and that such an application could only be made to the Court of appeal.

(1) 14 W. R., 384.
(2) I. L. R., 11 Calc., 146.
(3) L. R., 11 Ch. D., 576.
(4) L. R., 18 Ch. D., 394.
(5) L. R., 12 Ch. D., 438.

1894

YAMIN-UD-DOWLAH v. AHMED ALI KHAN.

In the later case of *Otto* v. *Lindford* (1), where an action had been dismissed with costs, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal, and that that question differed entirely from the question which had been determined in the previous case of *Wilson* v. *Church*.

The practical result of these two cases is to establish the rule, that when an action has been dismissed with costs, the Court of first instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal of the action.

In this country the power which the English Courts have of staying proceedings for costs under an order of dismissal is given by section 545 of the Civil Procedure Code. No doubt in the case of *Polini* v. *Gray* (2) the Court of Appeal, consisting of the same Judges who decided the other cases to which I have referred, assisted by Lord Justice James, though it dismissed the suit which had been brought for establishing the claimants' right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. There are in that case circumstances which serve to distinguish it from the preceding case of *Wilson* v. *Church*, one of the circumstances being that in order to enable an application to be made for an *interim* injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is, I think, sufficient to say that in the later case of *Otto* v. *Lindford* the case of *Wilson* v. *Church* is expressly referred to and is treated as a continuing authority. Reading, therefore, the case of *Polini* v. *Gray* with the later case of *Otto* v. *Lindford*, the proper conclusion is that the jurisdiction exercised by the Appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which is confined to the Appeal Court in matters which are appealed or intended to be appealed to the House of Lords: see *Hamill* v. *Lilley* (3). No procedure exists under

(1) L. R., 18 Ch. D., 394. (2) L. R., 12 Ch. D., 438.
(3) L. R., 19 Q. B. D., 83.

which an application for an *interim* injunction can be made to the House of Lords direct. The jurisdiction exercised by the Appeal Court in *Polini* v. *Gray* in respect of an application which could not be made to the higher tribunal was therefore one strictly of necessity. The other cases which have been cited in support of this application, of which *Brewer* v. *Yorke* (1) may be referred to as an example, deal with the power of the Court to stay execution of its own order, and have, I think, no bearing on the present question.

A point has also been made of the fact that in this case no appeal has as yet been filed, and that the filing of the appeal has been purposely delayed in order to admit of the present application being made to this Court. In *Wilson* v. *Church* it is true an appeal would seem to have been filed, which was followed by an application to the Appellate Court for an injunction. But this distinction appears to me to be immaterial. The decision in *Wilson* v. *Church* proceeded on the ground that the Court of first instance had no power to interfere, not because an appeal had been filed, but because the suit had been dismissed. It appears to me that under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit. This view is, I think, supported by the Indian cases which have been cited, *viz.*, *Moheeooddeen* v. *Ahmed Hossein* (2), and *Gossain Money Puree* v. *Guru Pershad Singh* (3). The result is that the application must be refused with costs.

Application refused.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*

Attorneys for defendants: Messrs. *Harris & Simmons*, Mr. *M. Dover*, and Mr. *E. O. Moses*.

T. A. P.

(1) L. R., 20 Ch. D., 669. (2) 14 W. R., 384.
(3) I. L. R., 11 Calc., 146.

Before Mr. Justice Sale.

1894.
Feb. 26.

KANYE LALL DASS *v.* SHAMA CHURN DAWN.*

Practice—Purchase-money, payment of, into Court—Conditions of sale—Interest—Registrar's sale—Costs.

Where the purchaser of a property at a Registrar's sale is out of time in paying into Court the balance of his purchase-money, the practice of the Original Side of the High Court is that payment of interest shall follow as a matter of course. But if there has been delay on the part of the party having the carriage of the proceedings, and if that party appears on the summons taken out by the purchaser for the purpose of paying into Court the balance of such purchase-money, he shall not be allowed his costs against the purchaser.

THIS was an application made in Chambers, on notice to all parties, by a purchaser of a property sold by the Registrar under a decree of the High Court, for leave to pay the balance of his purchase-money into Court, the period for payment of such balance having at the time of the application expired. The conditions of sale provided that a deposit of 25 per cent. should be deposited by the purchaser at the time of sale and the balance paid within one month; in default, interest at 12 per cent. being made payable from the end of one month from the day of sale until payment. The conditions further provided that the Registrar's certificate as to the result of the sale should be filed within eight days after the sale, the purchaser being at liberty to file it should the party having the carriage of the proceedings fail to do so, and to retain his costs of so doing out of the purchase money. Mr. *Swinhoe*, the attorney for the plaintiff, claimed interest on the ground that the time fixed for payment under the conditions of sale had expired. To this Mr. *N. C. Bose*, who appeared for the purchaser's attorney, objected, on the ground that the certificate of sale had not been filed within the time required by the conditions of sale, and that this default had caused the delay in paying in the money. Mr. *Swinhoe* pointed out that the purchaser had the remedy in his own hands, as he was entitled to file the certificate himself if default were made by the party having the carriage of the proceedings, and could do so at the cost of such party.

* Original Civil Suit 606 of 1891.

SALE, J.—This is an application by the purchaser at a Registrar's sale for liberty to pay into Court the balance of the purchase-money. The only question is what order should be made regarding the payment of interest on the purchase-money, the period for payment of the balance of the purchase-money having expired before the application for leave to pay it in was made.

It appears that, by the conditions of sale, the purchaser was required to pay a deposit of 25 per cent. on the purchase-money at the time of the sale, and to pay the balance within one month from the day of sale, and, in default of payment within one month from the day of sale, to pay such balance with interest at 12 per cent. from the end of one month from the day of sale until payment.

It is also required by the conditions that the Registrar's certificate as to the result of the sale should be filed within eight days after the sale, the purchaser being at liberty to file it if the party having the carriage of the proceedings should fail to do so, and to retain the costs of so doing out of the purchase-money. This is also provided for by Rule 415 of the Rules of Court. See Belchambers' Rules and Orders, p. 196.

After a certificate as to the result of a sale has become binding, the purchaser may apply by summons for leave to pay the balance of the purchase-money into Court. A certificate of sale, if not objected to, becomes binding at the end of 14 days from the date of its being filed. This leaves the purchaser a period of about a week to apply for leave to pay the balance of the purchase-money into Court. It is obvious, therefore, that if there be any delay in filing the certificate as to the result of the sale, the purchaser may be placed at a disadvantage. But the position of the purchaser is, I think, sufficiently protected by the rule above referred to, which is also a condition of sale, permitting him to file the certificate if the party having the carriage of the proceedings fails to do so in proper time, and retain the costs out of the purchase-money. It seems impossible to adopt any course which is practicable in these cases, except to proceed strictly in accordance with the conditions of sale and the practice laid down by the Rules of Court; and I desire therefore to indicate that for the future the practice will be in all cases, where the purchaser is out of time, to make the payment of interest follow as a matter of course, subject only to this, that if

1894

KANYE LALL DASS v. SHAMA CHURN DAWN.

there has been delay on the part of the party having the carriage of the proceedings, and, if that party appears on the summons taken out by the purchaser, to disallow him any costs as against the purchaser.

In this matter the purchaser will be at liberty to pay in the balance of the purchase-money, but he will be required to pay interest from the end of one month from the date of sale until payment of the balance of the purchase-money. The only remission I can make in his favour is to exclude the period during which the matter has been *sub judice*, that is the period between the day on which this application was made and to-day. The purchaser will bear his own costs of this application. The plaintiff's costs will be costs in the cause.

Application allowed.

Attorney for the plaintiff: Mr. *Swinhoe.*

Attorney for the purchaser: Babu *J. C. Dutt.*

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Norris, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

1894 *April* 2.

MUCHIRAM BARIK (PLAINTIFF) *v.* ISHAN CHUNDER CHUCKERBUTTI AND OTHERS (DEFENDANTS).*

Transfer of Property Act (IV of 1882), *s.* 135 (*cl. d.*).—*Actionable claim—Mortgage bond.*

Per PETHERAM, C.J., NORRIS, O'KINEALY and GHOSE, JJ. (PRINSEP, J., dissenting).—The right to recover a loan secured by a mortgage of immoveable property is an "actionable claim" within the provisions of section 135 of the Transfer of Property Act.

Per PETHERAM, C.J., NORRIS and GHOSE, JJ.—Where an actionable claim has been assigned, the debtor may be discharged from all liability by payment to the buyer of the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it; provided that such payment is made at any time before a judgment of a competent

* Full Bench reference in special appeal 99 of 1891, against the decree of the District Judge of Midnapore, dated 30th August 1890, modifying the decree of the 1st Subordinate Judge of that district, dated 28th January 1890.

Court has been delivered affirming the claim, or before the claim has been made clear by evidence and is ready for judgment; but if such payment is not made before the period mentioned the assignee is entitled to judgment for the whole debt.

Per PRINSEP, J.—The provisions of section 135, clause (*d*), refer to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. *Jani Begam* v. *Jahangir Khan* (1) and *Nilakanta* v. *Krishnasami* (2) approved of. *Rajendra Narain Bagchi* v. *Watson & Co.* (3) referred to.

Per O'KINEALY, J.—Clause (*d*) of section 135 refers to circumstances arising before the transfer of the actionable claim, and clauses (*a*), (*b*), and (*c*) refer to circumstances coming into existence at the time of the transfer.

THIS appeal was originally heard by PRINSEP and HILL, JJ., who, differing in opinion on a point of law, referred the case under section 575 of the Code of Civil Procedure to a Bench consisting of PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY and GHOSE, JJ., who in turn referred it to a Full Bench with the following order:—

"This is a suit on a mortgage bond brought by the assignee of the bond, who is found by the lower Appellate Court to have bought it for Rs. 500. The mortgage debt was originally Rs. 1,250; the bond was purchased after the due date mentioned in it. The amount due at the time of suit was stated to be Rs. 5,610, of which the plaintiff gave up Rs. 3,110 and claimed Rs. 2,500 in this suit, which was undoubtedly due and claimable under the mortgage bond, unless the provisions of section 135 of the Transfer of Property Act operate so as to preclude the plaintiff from recovering more than the price paid by him with interest. The decisions in this Court upon the construction of section 135, as bearing on the question arising in this case, are in conflict with those of the High Courts of Madras and Allahabad. The opinion of the majority of the Judges of the present Bench inclines to the view taken by the Judges of the High Courts of Madras and Allahabad. The question is therefore referred for the consideration of a Full Bench:—

"(1) Whether the terms of clause (*d*) of section 135 of the Transfer of Property Act refer to the state of things existing at the date of the assignment of the actionable claim:

(1) I. L. R., 9 All., 476. (2) I. L. R., 13 Mad., 225.
(3) I. L. R., 18 Calc., 510.

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

"(2) Whether if at the date of the assignment no judgment of a competent Court has been delivered affirming the claim, and the claim has not been made clear by evidence and become ready for judgment, the buyer of the actionable claim is only entitled to recover from the person against whom it is made the price he paid for it, and the incidental expenses of the sale, with interest on the price from the day that the buyer paid it."

Dr. *Rash Behari Ghose* (with him Babu *Jogendra Nath Bose* and Babu *Horendro Nath Mukerji*) for the appellant :—I contend that an assignee of a debt secured by a mortgage of immoveable property is not the buyer of an actionable claim. No distinction can be made between a simple mortgage and an English mortgage; both must be brought under the Transfer of Property Act or both excluded. [O'KINEALY, J.—There is no *chose in action* in this country, and an "actionable claim" is defined in the Act.] Section 135 of the Transfer of Property Act shows that "actionable claim" has much the same meaning as "*chose in action*," and does not apply to an interest in land; I rely on the word "discharged" in that section, which would be inapplicable to a suit for possession of land. This latter point is referred to in *Modun Mohun Dutt* v. *Futtarunnissa* (1), but the case only decides that whether or no an interest in immoveable property falls under section 130 it certainly does not fall under section 135. In *Rathnasami* v. *Subramanya* (2), the point as to whether an assignee of a mortgage stood in a different position from an assignee of a mere debt was not argued. In *Singaracharlu* v. *Sivabai* (3) it seems to have been assumed that an assignee of a mortgage stood in no better position than an assignee of an unsecured debt. Section 135 is also referred to in *Ramakrishna* v. *Kurikal* (4). I submit that "an actionable claim" is not wide enough to include an interest in land; this has been held in Reg. Ap. 227 of 1890 decided on 10th August 1891. In England an equitable estate in land is not subject to the rules established regarding notice. See *Wiltshire* v. *Rabbits* (5), *Wilmot* v. *Pike* (6), *Lee* v. *Houlett* (7), *Rooper* v. *Harrison* (8), and *Govindrav* v. *Ravji* (9).

(1) I. L. R., 13 Calc., 297.
(2) I. L. R., 11 Mad., 56.
(3) I. L. R., 11 Mad., 498.
(4) I. L. R., 11 Mad., 445.
(5) 14 Sim., 76.
(6) 5 Hare, 14.
(7) 2 K. and J., 531.
(8) 2 K. and J., 86.
(9) I. L. R., 12 Bom., 33.

On the second point this Court has held that a defendant may be discharged from liability by payment before judgment of the sum which the assignee has paid for the debt, but that if the payment is not made before judgment the assignee is entitled to the whole debt—*Khoshdeb Biswas* v. *Satar Mondol* (1), *Rajendra Narain Bagchi* v. *Watson & Co.* (2), *Grish Chandra* v. *Kashisauri Debi* (3). The case of *Subbammal* v. *Venkatarama* (4) follows the Calcutta cases, but the cases of *Rathnasami* v. *Sabramanya* (5), *Nilakanta* v. *Krishnasami* (6), and *Ramachandra* v. *Venkatarama* (7) dissent from that view of the law. The High Courts have differed as to the meaning of clause (*d*) of section 135: the Madras and Allahabad read the clause as if the transfer was made after the judgment of a competent Court, but the Calcutta High Court has always held that this section does not apply where a debtor chooses to contest the claim of the assignee and is defeated. I rely on the Calcutta cases and on the reasoning of the Judges in *Rajendra Narain Bagchi* v. *Watson & Co.* One objection to the Madras and Allahabad cases is that after a Court has decided on a claim, it could not be said to be an "actionable claim." The word "claim" means the claim of the assignee.

Babu *Golap Chunder Sircar* for the respondents:—The definition of an "actionable claim" in section 130 is large enough to include an interest in immoveable property. The word "discharged" may also refer to immoveable property. In section 137 the word "charge" is used; a mortgage is a charge; the words of clause (*c*) section 135 refer to immoveable property. Immoveable property has been held to be the subject of an actionable claim in *Rajanikanth Nag Rai Chowdhuri* v. *Hari Mohan Guha* (8), in *Lala Jugdeo Sahai* v. *Brij Behari Lal* (9), and in *Subbammal* v. *Venkatarama* (10). As to the case, *Grish Chandra* v. *Kashisauri Debi* (3), Mr. Justice Mitter reads the section "the debtor would be discharged," but the section does not say so. Section 135 lays

(1) I. L. R., 15 Calc., 436.
(2) I. L. R., 18 Calc., 510.
(3) I. L. R., 13 Calc., 145.
(4) I. L. R., 10 Mad., 289.
(5) I. L. R., 11 Mad., 56.
(6) I. L. R., 13 Mad., 225.
(7) I. L. R., 13 Mad., 516.
(8) I. L. R., 12 Calc., 470.
(9) I. L. R., 12 Calc., 505.
(10) I. L. R., 10 Mad., 289.

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

down that the effect of a sale of an actionable claim is to limit the buyer's right, or to reduce the debt to the amount of the price given for it. Clause (*d*) of that section contemplates a suit by the seller.

Dr. *Rash Behari Ghose* in reply.

The following opinions were delivered by the Court (PETHERAM, C.J., PRINSEP, NORRIS, O'KINEALY and GHOSE, JJ.):—

PETHERAM, C.J. (NORRIS, J., concurring).—In his plaint the plaintiff states that the first defendant and the father of the second borrowed Rs. 1,250 from the third defendant on the 2nd of Kartick 1287 at Re. 1-12 a month's interest; that they gave a mortgage bond to secure the loan; that he on the 2nd Assar 1294 bought the claim from the mortgagee for Rs. 725, and that there was due on the bond at the time the suit was brought the sum of Rs. 5,610-9, but the plaintiff claims Rs. 2,500 only, in consequence, as he says, of the defendant's inability to pay.

The first and second defendants plead, amongst other things, that the money was not borrowed, nor was the bond executed by the alleged borrowers, and that if it were so, the plaintiff did not pay Rs. 725 for the claim, and cannot get more than he may be found to have paid.

The District Judge on appeal has found that the advance was made, and the bond duly executed, but that the plaintiff paid Rs. 500 only upon the sale of the bond to him; and he has given him a decree for that amount, with interest at 12 per cent. from the date of his purchase, and expenses incidental to the purchase. He thought that what was bought by the plaintiff was an "actionable claim" within section 135 of the Transfer of Property Act, and that the question was concluded by the decision of a Full Bench of the Madras Court, in *Nilakanta* v. *Krishnasami* (1).

The plaintiff appealed to this Court, and the case came before Prinsep and Hill, JJ., sitting as a Division Bench: they differed on the question whether what the plaintiff bought was an "actionable claim" within the meaning of the section, and the special appeal was referred to a Bench of five Judges for decision

(1) I. L. R., 13 Mad., 225.

under section 575 of the Civil Procedure Code, and they referred it to this Full Bench.

Two questions of law have been argued before us, and in the view I take of the case it will be necessary, in order to decide the appeal, for me to express an opinion upon each of them.

The first is, whether the right to recover a loan secured by a mortgage of immoveable property is an "actionable claim" within the provisions of section 135 of the Transfer of Property Act; the second, whether if it is, debtors in the position of the defendants in the present case, who have not paid anything either before the suit, or pending the suit, but have on the contrary always, until the judgment of the Court of appeal had been given against them on the point, alleged that the money was never borrowed at all, and that the bonds were forgeries, can now avail themselves of the provisions of section 135, to decrease the amount of their liability to the plaintiff. On each point there are decisions in the Indian Courts. Those on the first point are as follows: *Lala Jugdeo Sahai* v. *Brij Behari Lal* (1). In that case Mitter and Agnew, JJ., decided that the provisions of section 131 of the Transfer of Property Act apply to the assignment of a mortgage. *Modun Mohun Dutt.* v. *Futtarunnissa* (2): Mitter and Grant, JJ., expressed the opinion, though it was unnecessary for the decision of the case, that section 135 refers to claims for money of some kind, or the like, although the money claim may be a charge on immoveable property. *Subbammal* v. *Venkatarama* (3): Collins, C.J., and Parker, J., held that a claim by an assignee upon a mortgage deed was within the provisions of sections 131 and 135. *Rathnasami* v. *Subramaniya* (4): Collins, C.J., and Ayyar, J., held that a claim on a mortgage-bond was within the provisions of section 136, and expressed the opinion that it was certainly within clause (*d*) of section 135. *Hakimunnissa* v. *Denonarain* (5): Straight and Brodhurst, JJ., held that in a suit by the assignee of a mortgage security the defendants were

(1) I. L R., 12 Calc., 505.
(2) I. L. R., 13 Calc., 297.
(3) I. L. R., 10 Mad., 289.
(4) I. L. R., 11 Mad., 56.
(5) I. L. R., 13 All., 102.

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

entitled to the benefit of section 135. *Ramachandra* v. *Venkatarama* (1): Ayyar and Shephard, JJ., allowed the defendant in a suit on a mortgage-bond the benefit of section 135. These are the reported decisions on the first point to which we have been referred and they are all one way, so that it appears that until the present case no doubt has been expressed in any one of the Indian Courts that a right to recover a debt, although it is secured by a mortgage of immoveable property, is an "actionable claim" within the meaning of section 135 of the Transfer of Property Act; and I have no hesitation in saying that I agree in the view which has been acted upon down to the present time. The claim is to recover a sum of money which had been lent by the assignor of the plaintiff to the defendant, payment of which is secured by a mortgage: it is not an action to recover possession of the land, but to recover the money by sale of the security and other property of the debtors, if the security is not sufficient. This is a claim which can be enforced by action and in no other way.

Section 130 enacts that a claim which the Civil Courts recognize as affording grounds for relief is actionable, and section 137 and its illustration which are found in the Chapter headed "transfers of actionable claims" would seem to indicate that it was the express intention of the Legislature to include debts secured by charges at all events in the provisions as to actionable claims. I think the words of the Act are so clear that it is impossible for the Court not to give effect to them by holding that debts secured by mortgage are "actionable claims" within the meaning of the whole Chapter, and that such debtors are entitled to the benefits of section 135.

It may be well to note that the definition of an "actionable claim" in the Transfer of Property Act is intentionally wider than that to be found in some other Codes. See the Anglo-Indian Code by Mr. Whitely Stokes, page 813, Volume I.

The second question is one on which the decisions of this Court are in conflict with those in Madras and Allahabad. The cases to which we have been referred are—*Grish Chandra* v. *Kashisauri Debi* (2) in which Mitter and Grant, JJ., decided that as the debtor, the defendant, did not pay or offer

(1) I. L. R., 13 Mad., 516. (2) I. L. R., 13 Calc., 145.

the amount he was bound by section 135 to pay, the section did not apply, and the plaintiff, the assignee of the debt, was entitled to recover the full amount of the debt without reference to what he himself paid for it. *Subbammal* v. *Venkatarama* (1), in which Collins, C.J., and Parker, J., followed Mitter and Grant, JJ., and held that as the defendant had not paid the assignee the amount he had himself paid for the claim, the section did not apply, and the assignee was entitled to recover the whole of the debt. *Jani Begam* v. *Jahangir Khan* (2): Straight and Tyrell, JJ., dissented from these cases and held that in all cases the assignee was prevented by section 135 from recovering more than he had paid. *Khoshdeb Biswas* v. *Satar Mondol* (3) in which the Chief Justice and Tottenham, J., followed Mitter and Grant, JJ., but added that in their opinion payment in the suit entitled the defendant to the benefit of section 135. *Hakimunnissa* v. *Deonarain* (4), in which Straight and Brodhurst, JJ., followed the case of *Jani Begam* v. *Jahangir Khan* (2), and again held that in all cases the assignee of a debt was precluded by the provisions of section 135 from recovering more than the amount which he had himself paid for it. They expressly dissented from the two cases in the Calcutta Court. In *Nilakanta* v. *Krishnasami* (5), Collins, C.J., Parker, Shephard and Handley, JJ., sitting in Full Bench dissented from the cases in the Calcutta Court, and agreed with the Allahabad Court that the assignee could only recover from the debtor what he had himself paid. *Rajendra Narain Bagchi* v. *Watson & Co.* (6), in which Prinsep and Banerjee, JJ., followed the cases of *Grish Chandra* v. *Kashisauri* (7) and of *Khosdeb Biswas* v. *Satar Mondol* (3) and that of *Subbammal* v. *Venkatarama* (1), and differed from that of *Jani Begam* v. *Jahangir Khan* (2), but did not notice the Full Bench case of *Nilakanta* v. *Krishnasami* (5).

I have never thought the point by any means clear, but after a good deal of consideration I have come to the conclusion that the decisions of this Court are right. The view of the section taken

(1) I. L. R., 10 Mad., 289.
(2) I. L. R., 9 All., 476.
(3) I. L. R., 15 Calc., 436.
(4) I. L. R., 13 All., 102.
(5) I. L. R., 13 Mad., 225.
(6) I. L. R., 18 Calc., 510.
(7) I. L. R., 13 Calc., 145.

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

by the Madras and Allahabad Courts is that it creates an absolute bar to an action brought by the assignee for anything beyond the amount paid by him with interest and expenses in the same way in which section 4 of the Limitation Act is a bar if the money sued for had become due more than three years before the suit, and nothing had happened to prevent the operation of the law of limitation. This Court, on the other hand, has held that the defendant may be discharged from all liability by payment before judgment of the smaller sum, but that if such payment is not made before the final judgment is given the assignee is entitled to judgment for the whole debt.

I think that this Court has been right in holding that unless he has fulfilled the condition imposed by the section and has paid the amount which the assignee paid, the debtor is not entitled to the benefit of the section. If it was the intention of the Legislature to provide that in no case should a decree be made in favour of the assignee of a claim for a sum larger than that which he had himself paid for it, with interest and expenses, I am unable to understand why they did not use such words as those to be found in section 4 of the Limitation Act, words which have a well-understood meaning and as to which there could be no doubt. It appears to me that when they decided to use the language which we find in section 135 of the Transfer of Property Act, they must have contemplated something different to the absolute bar which is created by the Limitation Act; and as in this country at the time when the Transfer of Property Act was passed, it was the right of the assignee to recover from the debtor the whole of the debt without reference to what the assignee had himself paid for it, and as the effect of the enactment in section 135 is to take from him an existing legal right, I think that we ought to be satisfied that the conditions, under which the debtor is entitled to say that that right has been destroyed and his own debt partially extinguished, have been fulfilled by him, before we can say that he is entitled to the benefit of the section. I think that this Court has been right in holding that nothing short of payment of the amount which the assignee paid with interest and expenses *before final judgment* will operate to discharge the debtor under the section. It is strongly contended that it cannot be that the assignee can

obtain a decree for the whole amount unless the debtor has paid the smaller amount, because it is said that the debtor has no means of knowing what the assignee has paid for the debt, and that to deprive him, the debtor, of the means of putting the purchaser to proof in an action for the debt of what he paid for it, is in fact to deprive him of the benefit of the section altogether. I do not think that this is the case. In the case of *Khoshdeb Biswas* v. *Satar Mondol* (1), I expressed the opinion that payment in the suit would entitle the debtor to the benefit of the section, and if I was right in that opinion, I can see no reason why, when in an action by the assignee of a debt, the question is not whether the debt was ever incurred at all, but what was the amount which was paid for it, that question should not be tried in some way which would enable the defendant to deposit the amount when found with interest and expenses in Court under section 376 of the Civil Procedure Code before final judgment was given in the suit; and as in all cases in this country the costs of litigation are in the discretion of the Court, there is no danger of injustice being done by their falling on any one but the party in the wrong.

I think that the claim in this suit is an "actionable claim" within the meaning of the Transfer of Property Act, but that as the defendant did not pay the amount paid by the plaintiff for the claim with interest and expenses before judgment, but disputed the claim throughout, the plaintiff is entitled to judgment for the whole of his claim.

In the result I think that the appeal should be allowed and that the plaintiff should have judgment for a sum not exceeding Rs. 2,500 and costs in all Courts.

The decree will be drawn up in accordance with section 88 of the Transfer of Property Act for Rs. 1,100 in addition to the amount given by the Court below, with costs in this Court with interest at 6 per cent. to date of this decree.

PRINSEP, J.—It is with much reluctance that I find myself unable to concur with my learned colleagues that a mortgage debt is an "actionable claim" coming within section 135 in the event of the transfer by assignment of the rights and liabilities of the mortgage on payment of a sum less than the full amount due.

(1) I. L. R., 15 Calc., 436.

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

A debt is no doubt an actionable claim and is expressly dealt with by Chapter VIII of the Transfer of Property Act which is entitled "of transfers of actionable claims." A mortgage is defined by section 58 to be "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability," and section 8 declares that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee) but not arrears of interest accrued before the transfer."

It would therefore seem that where a debt is secured by the mortgage of specific immoveable property, the transfer by sale of the right to recover the money payable carries with it the right to recover it by foreclosure or sale as set out in the mortgage bond, but in respect of interest only so much as may be due before the transfer, unless "a different intention is expressed or necessarily implied," that is unless the terms of the transfer should convey expressly or by implication all rights to recover such interest. But Chapter IV, I think, professes to deal exhaustively with "mortgages of immoveable property and charges." It describes the rights and liabilities of both mortgagor and mortgagee, and it provides a procedure for foreclosure and sale as well as for redemption and other matters relating to this subject.

Section 83 declares that "at any time after the principal money has become payable, and before a suit for the redemption of the mortgaged money is barred, the mortgagor or any other person entitled to institute such suit may deposit in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage."

Section 91 and the following sections provide for a redemption of a mortgage and set out the procedure in a suit for redemption by which an account is to be taken and the money due to be

determined, and it provides also that a date shall then be fixed for payment, declaring the result of payment within that time or default.

On the other hand, provision is also made for enforcing the rights of a mortgagee by foreclosure or sale on default of payment within the time specified in the mortgage bond, and a similar course is to be taken by the Court to determine the amount due and to fix a time for payment on default of which in a suit for foreclosure the mortgagor's right to redeem is barred and possession is given to the mortgagee while in a suit for sale the property is to be sold.

But it is contended that when an actionable claim, that is a mortgage debt, is sold by a mortgagee, the mortgagor is not bound to pay the entire amount due, but is "wholly discharged" by paying a smaller sum to the buyer, being the price paid by him to the mortgagee, together with incidental expenses of that sale with interest on the price from the day that the buyer paid it, and this it is said is the effect of section 135. Still a mortgagor would not be "wholly discharged" if there was something still due to the mortgagee, such as interest which may have accrued before the date of transfer and not transferred expressly or by necessary implication. This is especially provided for by section 8, which must be read with section 135, whether a mortgage debt be or be not an actionable claim within the latter section. Section 135, however, professes wholly to discharge a debtor, and it would not do so in such a case. It is therefore difficult to understand how this section can be applied to all suits for foreclosure or sale. It may be said that it is intended wholly to discharge the mortgagor only in respect of his debt to the transferee mortgagee, and that his liabilities in respect to the original mortgagee may still exist so as to form the subject of an order under section 86 in a suit for foreclosure or under section 88 in a suit for sale. It seems to me that this is not the proper construction of this section, which was wholly to discharge the debtor of his debt or actionable claim, and not to discharge him only of a portion of that debt, and it would, in my opinion, be altogether inconsistent with the character of a mortgage debt and the law for foreclosure and sale that such a debt should be so divided. To do so would have the effect of

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

entirely altering the form of the order which is to be passed in a suit for foreclosure under section 86 or for sale under section 88. This seems to show that the Legislature did not intend to bring a mortgage debt within the terms of Chapter VIII. The object of the Legislature by the enactment of a special chapter containing a special procedure for the recovery of money due on mortgages of immoveable property was to make a simple law dealing exhaustively with this subject and to provide once for all, in one chapter of the Act, for all matters relating to the mortgages of immoveable property. To introduce other matters, such as that now under consideration, would altogether defeat this object, for it would only tend to obscure what was otherwise clearly expressed. A mortgage debt seems to me to stand on different grounds from an ordinary and unsecured debt, and I am inclined to think that section 135 was intended to apply only to such simple debts. Another difficulty occurs to me. As I understand the law it is only by payment of a mortgage debt either out of Court or after an order for payment in a suit for foreclosure or sale or by a suit for redemption that a mortgagor can obtain a discharge so as to extinguish the security or the interest in his immoveable property which the mortgage has created in favour of another. A portion of Chapter IV of the Transfer of Property Act deals with suits for redemption. Could a mortgagor bring such a suit against the purchaser of the rights of a mortgagee and in it obtain relief by payment of a sum smaller than that actually due on the mortgage? It seems to me that section 92 and the following sections, which deal with suits for redemption, cannot be made applicable to a suit for redemption by a mortgagor claiming relief under section 135. The difficulty is further increased in all these matters if section 135 is to be applied to what is termed an English mortgage. It is for these and other reasons which I need not specify that after a long and careful consideration I find myself unable to agree with my learned colleagues as regards what is said to have been the object of legislation in Chapter VIII, *viz.*, to stop trafficking in litigation which is unfortunately so prevalent in this country. I confess that I feel, too, that this object has failed to reach an important class of cases in which no relief would be possible. Take for instance the purchase of what is familiarly termed the *dena*

pawna of a trading business or outstanding debts for a comparatively small sum. No individual debtor would be able to obtain any relief under section 135, for he would be unable to show that his particular debt was bought for a lesser sum, though in the aggregate the amount paid by the transferee would be much less than that claimed by the transferer from his debtors. The speculator would thus be beyond the law, and the law would be defeated in a case which shows in exaggeration the evils which it is desired to avert.

It is also inconceivable, too, that the Legislature should have intended that the pleader of any Court should be incapable of obtaining the assignment of a mortgage of immoveable property situated within the local jurisdiction of the Court with which he is connected, though he is certainly not debarred from taking the original mortgage.

This, however, would be the effect of section 136 if it be applied to a mortgage debt. It has been suggested that, as the illustration to section 137 refers to a debenture which is a charge, and Chapter IV deals with mortgages of immoveable property and charges, therefore as a debenture is an "actionable claim," a mortgage is one also, and any difficulty regarding the application of Chapter IV disappears. The illustration to section 137 is, I think, unfortunate if it be intended to include a debenture as an "actionable claim" coming within the other sections to Chapter VIII. I cannot understand how section 135 could be applied to a debenture, or how when the credit of a company was low, and the debentures were saleable and sold below par, the company could redeem them at any time most convenient to it by paying only the price paid for them by holders.

I hope that by the doubts which I have expressed regarding the present state of the law, I may succeed in drawing attention to this subject so as to set it at rest.

Being, therefore, of opinion that this is not an "actionable claim," I would set aside the judgments of the Lower Courts and decree the suit, as both Courts have found that the full amount claimed was due under the mortgage executed by the defendants. But as I am overruled on this part of the case, it becomes my duty to consider the second point which has been referred for the

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

opinion of this Full Bench. This is, taking it that the mortgage debt which has been transferred to the plaintiff by purchase from the mortgagee is an "actionable claim" to be dealt with under Chapter VIII, are the defendants entitled to any relief under section 135, and if so, what order should be passed to determine this?

We are met by conflicting judgments of this Court on the one side, and those of the Allahabad and Madras High Courts on the other, regarding the construction of section 135 [and especially proviso (*d*)] of the Transfer of Property Act. On the one hand it is contended that the plaintiff can obtain only the price paid by him and incidental expenses of the sale, together with interest on the price from the day on which he paid it. On the other hand, it is contended that the defendants have lost any claim to such relief by contesting the suit, and that at any rate they are bound to pay the full amount, and can obtain relief only by paying at once the lesser sum, and that the proper decree should be for the full amount of the mortgage debt.

It is stated that, the defendants having denied not only the assignment but the mortgage debt, they are under section 135 (*d*) deprived of the benefit of that section. As authorities for this the following cases have been cited:—*Grish Chandra* v. *Kashisauri Debi* (1), *Khoshdeb Biswas* v. *Satar Mondol* (2), and *Rathnasami* v. *Sabramanya* (3). It may, however, be mentioned that this last case has been overruled by a Full Bench of the Madras High Court in *Nilakanta* v. *Krishnasami* (4), and in support of this view there is also *Jani Begam* v. *Jahangir Khan* (5). I find that I am in some measure committed as one of the Judges who decided *Rajendra Narain Bagchi* v. *Watson & Co.* (6).

On full consideration I am of opinion that the view taken by the Full Bench of the Madras High Court and by a Division Bench of the Allahabad High Court in the cases last mentioned is correct, and that section 135 (*d*) refers only to the state of things at the time of the transfer of an "actionable claim." It is not the conduct of the defendant debtor which would deprive him

(1) I. L. R., 13 Calc., 145.
(2) I. L. R., 15 Calc., 436.
(3) I. L. R., 11 Mad., 56.
(4) I. L. R., 13 Mad., 225.
(5) I. L. R., 9 All., 476.
(6) I. L. R., 18 Calc., 510.

of relief under section 135. The object contemplated by the Legislature seems to have been to discourage speculative purchases in matters which were uncertain and might be made the subject of litigation, and to do so it enabled a debtor to obtain relief by putting such a person in the same position as he would have been before the purchase of the actionable claim and to deprive him of any advantage from it. Where the amount of the debt is certain either by an order of the Court affirming the claim, or made clear by evidence, and is ready for judgment, a transfer is not open to such an objection, and therefore is not in my view of the law discountenanced. It is no longer a speculative claim and can be properly made the subject of a conveyance to a third party.

I aggree with Collins, C.J., in the Full Bench case of *Nilakanta* v. *Krishnasami* (1), that "a defendant has a right to put the purchaser of an actionable claim sued on to the proof of his claim, and also to contend that at all events he cannot recover more than the sum he purchased it for, together with interest and expenses. The debtor is to be wholly discharged by paying to the buyer the price given for such claim and incidental expenses of the sale with interest. If the debtor is wholly discharged in law by payment of a certain sum, it seems to follow that the creditor is only entitled to recover that sum," or as Shephard, J., puts it in the same case, "when a man is said to be discharged from liability by payment of a certain sum, it is ordinarily meant that the liability is limited to that sum, and that no greater sum can be recovered by suit. The sum by payment of which a debtor is discharged is ordinarily the sum for which his creditor can obtain judgment. How can it possibly be said that the claim of the assignee is less meritorious because the debtor finds it expedient to satisfy it without dispute? The fact that the debtor admits the claim would rather go to show that the transaction between the assignor and assignee was not of a speculative character." I have referred to the case of *Rajendra Narain Bagchi* v. *Watson & Co.* (2) to which I was a party. The case of the Madras High Court just referred to was not cited to us, and on further consideration I am of opinion that we went too far, and that the construction put by the Madras High Court

(1) I. L. R., 13 Mad., 225. (2) I. L. R., 18 Calc., 510.

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

on section 135 clause (*d*) is correct, that is, that it refers to a state of things existing at the time of the assignment and not at the time of the enforcement of payment of the debt.

For these reasons I am of opinion that, taking the subject-matter of this suit to be an "actionable claim," the plaintiff is not entitled to recover more than the sum paid by her to the mortgagee with incidental expenses of the sale and interest from the date of payment of the price to the mortgagor, and that the suit should be remanded to ascertain the amount so due. The amount being determined, an order should be passed for payment in the terms of section 88 of the Transfer of Property Act. By expressing my opinion on this second point and stating the form of the order which should be passed if that view of the law be accepted, it must not be supposed that I hold that a mortgage debt is an actionable claim within Chapter VIII.

O'KINEALY, J.—In this case the plaintiff sued upon a bond, executed by the defendant No. 1 and the father of defendant No. 2, in favour of defendant No. 3, who had sold it to him for a consideration of Rs. 725.

He claimed Rs. 2,500 which, he said, were due to him, according to the terms of the bond.

Amongst the many defences raised, there was one relating to the Transfer of Property Act. It was stated, though without referring to section 135 of that Act, that the plaintiff was not entitled to anything more than the amount he had actually paid upon the bond. That defence prevailed in both the Lower Courts; but at the hearing of the Second Appeal before a Divisional Bench of this Court, the learned Judges differed in opinion,—one holding that the transferee's mortgage was subject to the limitation enacted by section 135 of the Transfer of Property Act, the other holding that Chapter VIII of that Act had no application to the transaction at all. In this conflict of opinion between the learned Judges an appeal was preferred to a Divisional Bench of this Court, and the Judges of it have referred the matter for decision to this Full Bench.

Under section 130 of the Transfer of Property Act an "actionable claim" is defined to be "a claim which the Civil Courts

recognise as affording grounds for relief is actionable, whether a suit for its enforcement is, or is not, actually pending, or likely to become necessary," or, in other words, a claim which will support an action. This use of the word "actionable" is referred to by Dr. Murray in his excellent dictionary, and he supports it by two extracts from standard law publications. In my opinion this definition governs Chapter VIII, and every section of this chapter must be interpreted subject to, and in accordance with, it, and if this be so, it is clear that no claim which has not so far ripened as to give a cause of action at the time of transfer is an "actionable claim." For example, I think a claim based on a void agreement, or for a sum of money not due, is not actionable. In neither case would the claim afford any ground for relief in our Courts.

Sections 131 to 134 declare the procedure necessary to be followed in transferring a special class of actionable claims, namely, debts and beneficial interest in moveable property.

In section 135 we find a second time the words "actionable claim" in Chapter VIII. They again appear in Section 136, which declares the incapacity of officers connected with any Court of Justice to buy any "actionable claim" falling under the jurisdiction of the Court in which he exercises his functions.

A claim may generally be defined to be the assertion and demand of recognition of an alleged right or title. It would therefore appear that the definition of "actionable claim" in section 130 recognizes all claims in regard to property moveable or immoveable which would be recognized in our Courts, and on which the claimant could obtain relief. Section 136 leads to the same conclusion. The obvious evil to be met with in that section is the evil arising from Judges or Officers of a Court buying up claims with which they may come into contact in their official capacity. This evil does not depend upon the nature of the claim, or on the subject-matter of it. I can see no difference between the impropriety of a Judge obtaining the assignment of a bond for a thousand rupees which could then form the basis of a claim in his Court, and buying up a claim to immoveable property of the same value, within his jurisdiction. I am, therefore, unable to perceive any ambiguity in the definition of section 130, and I think that the term "actionable claim" must at least cover every claim for

1894

MUCHIRAM BABIK v. ISHAN CHUNDER CHUCKERBUTTI.

which an action would lie in our Courts. This definition clearly covers the present case where the debt had fallen due and an action for its recovery could have been brought before assignment.

It is apparent from section 6 of the Transfer of Property Act, when read with section 8, that actionable claims constitute property, and that subject to the limitation laid down by section 6, and under the provisions of section 8 and Chapter VIII, all actionable claims are transferable. Section 135 declares that when an actionable claim is sold, the person against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it. It has been argued at the Bar that the right of the obligee is much higher. It has been said that the buyer is not entitled to get a decree for any amount larger than the price, incidental expenses, and interest. I am unable to acquiesce in this argument. The right of the plaintiff to recover is one thing, the right of the obligee to discharge the claim by a voluntary payment is another. Both the persons possessing the rights and the rights themselves are distinct and ordinarily bear no relation to each other.

In the same section four cases are stated to which the rule laid down in the first paragraph of section 135 does not apply; and the obligee is subject to the terms of the original obligation. It has been argued that in accordance with the decision in the case of *Rajendra Narain Bagchi* v. *Watson & Co.* and other decisions of this Court, clause (*d*) of section 135 does not apply to the case in which a debtor denies the existence of the claim altogether, or where the purchaser of the claim has obtained judgment for it before payment of the amount due under this section is made or tendered. These decisions have, however, been dissented from by the High Courts of Allahabad and Madras. I concur in the view adopted by these Courts. I think that clause (*d*), section 135, refers, as the language implies, to circumstances arising before the transfer of the actionable claim. Admittedly clauses (*a*), (*b*) and (*c*) refer to circumstances coming into existence at the time of transfer, and clause (*d*) reads as if the conditions mentioned in it had happened before the transfer. Moreover in this case no judgment has been given for the claim.

The conclusion at which I have arrived is that the claim in this suit is an actionable claim, that the plaintiff is subject to the limitation provided in the first part of section 135, and cannot claim the benefit of clause (*d*). At the same time I am unable to support the decree of the Lower Court which only gives the plaintiff the purchase-money, &c., leaving him to realise that amount as best he can by process of execution. I would set it aside and instead direct that a decree be given that if the defendant pays, within a time fixed by the Court, the sums mentioned in section 135 of the Transfer of Property Act, the claim shall be discharged; if not, that the usual mortgage decree be given for such portion of the claim as may be found due and has not been abandoned.

GHOSE, J.—I agree with the Chief Justice in the conclusion he has arrived at upon both the questions that have been discussed before us.

As to the question whether the claim in this case is an "actionable claim" within the meaning of section 135 of the Transfer of Property Act, I am of opinion that it is. A claim like this is really one to recover money, and notwithstanding that it may be enforced by sale of the properties mortgaged as collateral security, it is, I think, nevertheless an "actionable claim" as defined by section 130. The definition seems to me to be wide enough to comprehend a claim to recover a debt secured by a mortgage of immoveable property; and this would appear to be clear from paragraph 5 of section 8 of the Act where, with reference to what passes under a transfer of property, the Legislature has used those words: "and where the property is a debt or other actionable claim, the securities therefor," &c., &c. All the reported cases decided by the different High Courts which have been brought to our notice have taken but one and the same view, and the question therefore seems to me to be concluded by authority.

As regards the other question raised in this case, and which has been specially referred to the Full Bench, I am disposed to agree with the view that has been adopted in this Court in the cases referred to by the Chief Justice. It seems to me, reading the several parts of section 135 together, that the payment contemplated in the first paragraph of that section is a payment at

1894

MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTI.

some time or other *before* judgment "affirming the claim," and *before* "the claim has been made clear by evidence and is ready for judgment," as mentioned in clause (*d*) of the section. I do not think that the Legislature could have intended that, where the defendant contests the truth of the assignee's claim, and does not pay or offer to pay before judgment the amount of the consideration that the assignee paid, he, the defendant, may yet get a discharge by paying simply the consideration for the assignment and the costs. And I do not quite see why the clause (*d*) of section 135 should be held to apply only to a case where the assignment is made after decree has been pronounced in favour of the original holder of the bond. If the Legislature had so intended, nothing could have been easier than for them to adopt the same phraseology in clause (*d*) which they followed in the preceding clauses of section 135, *viz.*, they might have said, "When it is made subsequent to the judgment of a competent Court affirming the claim," etc., etc.

Appeal allowed.

T. A. P.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

1893. *Dec.* 18.

BASUMOTI ADHIKARINI (PETITIONER) *v.* BUDRAM KALITA (OPPOSITE PARTY).*

Parda-nashin lady—Attendance of parda-nashin—Warrant case—Issue of summons—Criminal Procedure Code, 1882, *ss.* 204, 205—*Discretion of Court.*

In a warrant case, the accused being a *parda-nashin*, the Magistrate can dispense with her attendance under s. 205 of the Criminal Procedure Code if he issues a summons in the first instance, and this he has a discretion to do under s. 204.

* Criminal Revision, No. 764 of 1893, against the order passed by G. Godfrey, Esq., Judge of the Assam Valley Districts, dated 31st October 1893, affirming the order of Babu Parosuram Khand, Extra Assistant Commissioner of Goalpara, dated the 26th September 1893.

1894

BASUMOTI ADHIKARINI v. BUDRAM KALITA.

THE facts were as follows:—

The complainant brought a charge against Basumoti Adhikarini under section 500 of the Penal Code. The charge was dismissed by the Deputy Magistrate of Goalpara on the 14th of March 1893. The case having been remanded by the Judge of the Assam Valley Districts was again dismissed on the 13th May 1893. The case was a second time remanded, and on the 22nd of August 1893 the Deputy Magistrate issued a summons on the accused, who was a *parda-nashin* woman. The accused then applied to be allowed to appear by agent and to have the proceedings set aside, on the ground that they had been instituted by a person who under the law could not institute such a charge. The application was rejected on the 31st of October 1893. The accused being dissatisfied with the Judge's decision, petitioned the High Court for revision of the Judge's order.

On the application for the rule being made—

Mr. *H. E. Mendies* appeared for the petitioner, and referred to the decisions of the lower Court, and to the terms of sections 204 and 205 of the Criminal Procedure Code.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

This is an application complaining of an order passed by the Extra Assistant Magistrate of Goalpara, refusing to dispense with the personal attendance of a *parda-nashin* woman who has been charged with defamation. The Magistrate seems to think that, under the law, he has no such power, and the terms of his order leave it doubtful whether, if he held that he has such power, he would not have exercised it. It seems to us that the Magistrate has taken an erroneous view of the law in this respect, and that he is competent to dispense with the personal attendance of the lady under the provisions of section 205, Code of Criminal Procedure. The offence, no doubt, is a warrant case, but under section 204, a Magistrate can exercise his discretion in such a case and issue a summons instead of a warrant. In the present case the Magistrate apparently did exercise such discretion. Section 205 declares that, whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal

1894

BASUMOTI ADHIKARINI v. BUDRAM KALITA.

attendance of the accused and permit him to appear by his pleader. The application of this section is not limited to summons cases, but to any case in which a Magistrate may issue a summons. Section 205 consequently applies to a case of this description. With the expression of this opinion as to the law, we leave it to the Magistrate to exercise such discretion as he thinks fit and proper.

C. S.

PRIVY COUNCIL.

P. C.*
1893
Nov. 23, 24.
1894
Jan. 27.

MAKUND RAM SUKAL (PLAINTIFF) *v.* SALIQ RAM SUKAL (DEFENDANT.)

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

Arbitration—Submission to arbitration—Award not disposing of all the matters referred—Finality of award—Validity of award—Consent of parties.

The ground for holding an award to be invalid on account of its not disposing of all the matters referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators.

The partition of joint estate, consisting of different properties, having been submitted to arbitration, and the parties agreeing to a division being made by steps, and that each division should be final, without any condition that the award should not be final while part remained undivided: *Held*, in a suit brought by one of the parties for partition of the whole estate, after such a division of part, that, although cases cited as to the invalidity of an incomplete award might have been applicable had the arbitrators awarded as to only part of the property of their own authority, and without that of the parties, it was competent to the latter to agree before the arbitrators to the division being made as it had been; and that here the partition, as to the property divided, was final. Only a decree for the partition of the undivided residue could be made.

APPEAL from a decree (16th July 1888) of the Judicial Commissioner, in part affirming and in part modifying a decree (28th August 1887) of the Commissioner, Nerbudda, which decree affirmed, with modifications, after two remands and intermediate

* *Present*. LORDS WATSON, HOBHOUSE, and SHAND, and SIR R. COUCH.

proceedings, a decree (18th September 1878) of the Deputy Commissioner, Nimar.

The question here raised was as to the effect of an award of the 3rd September 1874, made by arbitrators appointed by two brothers to make partition between them of all the ancestral and other estate held by them jointly, that award not having divided all the joint property. The award of 1874 was not filed under section 327, Act VIII of 1859, then in force. The Deputy Commissioner, Nimar, refused, on the ground of the award having been incomplete, to order this award to be filed, on an application made in January 1875 by one of the two brothers, Tulsi Ram, father of Saliq Ram, now respondent. Division of part of the joint family property belonging to the two brothers was made; but Makund Ram, the other brother, declining to abide by the award, brought this suit against his brother Tulsi Ram for partition of the whole joint estate, valuing it at more than thirteen lakhs. Tulsi Ram died in 1885, his son Saliq, thenceforth, representing him. The plaint alleged that the dispute was about the undivided property remaining "in their respective wrongful possessions," and that the award being incomplete was inoperative. The defence of Tulsi Ram was that partition could only be claimed of that part of the joint estate which had not been already divided by the award, and he set forth in separate schedules the divided and the undivided property. The only issues, material to this report, were whether the award was valid, and to what extent; and whether the property in the defendant's possession under the award belonged to him. On the 18th September 1878 the Deputy Commissioner, Nimar, found these issues in favour of the defendant, and he decreed division of the property not yet divided, dismissing the claim as to the other. On the 2nd September 1879 the Appellate Court, the Commissioner, Jabalpur, remanded the suit. Intermediate proceedings, which need not be specified, lasted till the 15th October 1883, when the Deputy Commissioner, Hoshangabad, issued a commission to Narain Seth, one of the original arbitrators, who filed lists setting forth a division of the property still undivided. On return after remand, on the 1st May 1884, the decree of the first Court was upheld by the Court above, the Commissioner, Nerbudda. On appeal to the Judicial

1893-94

MADUND RAM SUKAL v. SALIQ RAM SUKAL.

Commissioner the suit was again, on the 17th August 1885, remanded. Upon this a decision was given by the same Commissioner on the 22nd April 1886 dealing with all the questions of fact as to Makund's freedom of action, and as to the conduct of the arbitrators, and directing the lower Court to appoint fresh Commissioners, who should take up the report of the 15th October 1883 as the basis of their enquiry, and themselves report upon it. This report was made on the 25th June 1887, supporting the conclusions of the former in most particulars. On the 19th August 1887, the ultimate decree of the Nerbudda Court upheld the award of the 3rd September 1874, and decreed that the residue of the property should be divided in accordance with the report of the 25th June 1887, except as regarded three villages. These three were to be allotted to Makund, and the defendant Saliq Ram, in lieu of his share thereof, was to receive Rs. 24,000, each party to pay their own costs. On the 16th July 1888, the Judicial Commissioner gave judgment as follows, on the point to which this appeal mainly related, *viz.*, whether the award of 1874, though incomplete, was valid, or was invalid, for want of finality :—

"The arbitrators are to make an equal partition, that is really what the direction is, and there is no special provision as to how the partition is to be made, whether by actual metes and bounds, or in what way. In the case of *Gajapathi Radhika* v. *Gajapathi Nilamani* (1) it was said: "A document of this character between natives should not be construed "narrowly by a strict interpretation of the literal meaning of the words. "Its object and general spirit are the best keys to the interpretation of "language probably not very carefully studied." This principle should, I think, be applied in the present case. What the parties wanted was to have a partition made in the manner most suitable under the circumstances. I do not think they intended that, unless the arbitrators divided by actual metes and bounds every plot of ground, or divided in specie all the miscellaneous property, the award should be invalid. The award is, no doubt, incomplete ; but, except as regards the bonds and securities which the arbitrators were not allowed to divide, and the property which was not submitted to them for division, it was just such a partition as the parties probably would have made for themselves. Moreover, according to Russell (p. 267), the rule originally was, that unless there was an express condition that the award be made of and concerning the premises, an award respecting one matter submitted was good, provided that it was not necessary, to make the award just, that the other matters should also have

(1) 13 Moo. I. A., 509 : 6 B. L. R., 202.

been decided. The modern rule is, he says, that "an express condition is not "required; but the question in all cases to be decided is, whether the terms of the "submission show that the parties mean every point in dispute to be decided by "the arbitrators. . . . As it is not ordinarily the intent of the parties that "some matters only should be determined, and that they should be at liberty "to go to law for the rest, it follows that the arbitrator is generally bound to "make a final decision upon all the matters referred to him, in order that "his award as to any should be effectual." This principle was followed in a Bombay case, *Dandekar* v. *Dandekars* (1) referred to by the learned Counsel. But I think the rule should be applied liberally in a case like the present, regard being had to the way in which Hindu families themselves partition property, absolutely dividing some of it, and leaving a part undivided to suit their convenience. . . Russell goes on to say that if there be a clause empowering the arbitrator to make one or more awards at his discretion, the Courts, unless there be something repugnant to such a view, will hold that the arbitrator may make a valid and final award on one matter only, for the parties do not make it a condition to the validity of his decision on one subject that all matters should be disposed of by him (see also *Lewis* v. *Rossiter* (2), *per* Bramwell, B. If, then, in the present case there had been a clause empowering the arbitrator to make one or more awards at his discretion, the award would have been undoubtedly valid. As I understand the rule as to want of finality rendering an award invalid, it is based on the wording of the submission especially, and on what may reasonably be taken to be the intention of the parties, because the submission alone invests the arbitrator with authority, defines his duties, and is the foundation of his proceedings. Therefore I do not think it would be right to apply the English rule strictly in an Indian case, where the submission to arbitration is not written by one who is conversant with the law; but I would rather look to what was the probable intention of the parties, and what the justice of the case requires. I can see no injustice to either party in upholding the award in so far as it actually effects a partition. The cash and ornaments, the Bhonas house, the 26 villages in the Harda *tahsil*, and the houses in Harda, properly formed subjects for a separate partition. The parties had quarrelled and wished to separate, and they appointed a *panchayat* to divide their family property. If the *panchayat* succeeded in dividing the whole of the property, that would of course be most satisfactory; but, considering the nature of the property, I think that the parties could hardly have expected this, and that they must have contemplated that the award of the arbitrators would be valid as regards the property divided, even though the whole was not divided. As regards the property which was not brought to the notice of the arbitrators, the failure to divide it cannot be held to vitiate the award. If a question is not brought before an arbitrator for decision, the fact that he does not decide the question does not detract from the finality of his award. Then the bonds and securities could not be

(1) I. L. R., 6 Bom., 663. (2) 44 L. J. Exch., 136 at p. 139.

1893-94

MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

divided because Makund Ram locked them up, and it is not for him to object to the award because it does not divide these bonds. Of the rest of the property, what was left undivided without satisfactory reasons is, I have shown, property of little importance. I would notice also that as a great part of the property consisted of revenue-paying estates, complete partition of which could only be effected by the Collector, the parties could not have contemplated that the arbitrators would necessarily be able to make an absolute complete partition.

"For these reasons I am of opinion that the award cannot be set aside on the ground that it was not final."

On an appeal from the Judicial Commissioner's judgment, Mr. *R. B. Finlay, Q.C.*, and Mr. *C. W. Arrathoon*, for the appellant, argued that the award of 1874, having been indefinite and incomplete, was not final; and that the fact of its having been made was no answer to the claim. It was a general rule that an award must be made *ita quod fiat de præmissis.* Makund Ram had consented to partition by award, but that award was to have been complete and final. Wherefore, the award was ineffective to preclude a decree from being made for the partition of the whole of the family estate. It was not a correct conclusion to infer, from Makund's acts, his consent to there being an award made of part, the real submission and agreement of the parties having been that the award should be accepted, or rejected, in its entirety. There were also acts done, in connection with the making of the award, under official pressure, which had prevented the exercise by the arbitrators of their free and independent judgment. There had been official interference, and repeatedly during the proceedings the consent, said to have been given by the plaintiff, had not been freely given. He had objected to going on, and pressure had been exercised by Government officers.

The cases of *Randal* v. *Randal* (1); *Stone* v. *Phillips* (2); *Wakefield* v. *Lanelly Railway Co.* (3) were referred to.

Mr. *J. D. Mayne* and Mr. *N. D. Allbless*, for the respondent, contended that the arbitrators' award was an effectual partition of all the property which it purported to divide. It was not affected

(1) 7 East., 81. (2) 4 Bing., N.C., 37.

(3) 11 Jur., N. S., 456.

by the partition of the whole estate not having been completed, and was an answer to so much of this claim as related to the properties already partitioned by that award. Omission to consider a point on which the conclusion depended might have affected the validity of the award. But here no principle on which the award proceeded could be affected by the partition having been left unfinished. Thus, there was no real want of finality in the award. The divided property was separable from what had been left undivided, and the parties had accepted what had been apportioned to them. The conduct of the parties showed submission on their part to the arbitrators' action, and there was no condition, express or implied, that there should be no partition unless it should be a partition of the whole family estate. It had been the result of the plaintiff's own obstructiveness that part of the joint property had been left undivided, and to proceed by dividing part at a time was in no way inconsistent with the original reference. Upon all material questions of fact, the final decision of the first Appellate Court, the Commissioner of the Nerbudda division, was conclusive, and regarding all questions of law the judgment of the last Appellate Court, the Judicial Commissioner, was correct, and should be maintained.

Mr. *C. W. Arathoon* replied.

Afterwards, on the 27th January 1894, their Lordships' judgment was delivered by

SIR R. COUCH.—Makund Ram, the appellant, and Tulsi Ram, the father of the respondent, were brothers, and the suit from which this appeal arises was brought by Makund Ram against Tulsi Ram for partition of moveable and immoveable property in their joint possession, full details of which were given in lists annexed to the plaint. Tulsi Ram, in his written statement, admitted that he and Makund Ram were brothers and were entitled to the property in equal shares, but he submitted that the greater part of it had been partitioned, and that Makund Ram, the plaintiff, was only entitled to claim partition as regards such of the property as remained unpartitioned, the particulars of which were given in Schedules F. and G. to the written statement. He alleged that by an agreement dated the 14th of May 1874 it was

1893-94

MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

referred to arbitrators appointed by the parties to make partition of all the property; that the arbitrators met and proceeded step by step, at the request and with the consent of the parties, to divide the great bulk of the property, and the plaintiff and defendant each took possession of what came to his share; and he prayed that the property which had not been partitioned or divided might be partitioned and divided by the Court.—

The agreement to refer is in these terms:—

"We Makund Ram and Tulsi Ram Sukals are zemindars of *mouza* Bhonas, *tahsil* Harda in the Hoshangabad district. Whereas we, both brothers, are not on good terms with each other, it is evident that it is not proper now to live jointly. Within British dominions each of us two brothers is entitled to half and half share of moveable and immoveable property, whether ancestral or self-acquired or standing in the names of sons nominally; and we wish that the aforesaid property may be divided into two equal shares by arbitration. We therefore on our behalf nominate Narain Bhai Seth resident of Timurni, Sukhdeo Seth resident of Harda, and Manikchand Seth agent of Bhajju Shah Deochand Seth and residing at Hoshangabad, as arbitrators; and we hereby agree and bind ourselves in writing that none of us two will object to the taking and accepting of a thing allotted to his share by the arbitrators abovenamed having equally divided the property into two shares of the two brothers."

On the 3rd September 1874 the arbitrators made their award, the first part of which is as follows:—

"1. On the 15th May we held a meeting at village Bhonas and we allowed both the parties to divide cash, gold, silver, jewels, and precious stones, &c., between them. We adopted this measure with a view that strangers may not obtain a knowledge of such property. Both the brothers accepted and agreed to this arrangement and divided the property mutually. They admitted having done so before Mr. Nedham, Assistant Commissioner, and all the arbitrators. Further they took possession of their respective shares.

"2. On the 16th May the arbitrators proposed as follows regarding the division of the dwelling-house at *mouza* Bhonas. We the arbitrators arranged to divide the dwelling-house into two equal parts and to draw the share of each brother by lots. They would have then taken the share falling to their respective lots, but Makund Ram Sukal refused to draw lots, and stated that if Tulsi Ram paid him half price of the house to be fixed by him he can take the house. And if he does not like to do so he Makund Ram would take the same and pay Tulsi Ram half the price. On this the meeting of the arbitrators closed (for that day). On the 17th day of the same month before Manikchand and Sukhdeo Seth, Makund Ram valued the house at thirty thousand rupees, and stated that if Tulsi Ram pays him Rs. 15,000, *viz.* half of that amount (Rs. 30,000), he can possess the house with its limits. Tulsi Ram accepted

the above arrangement and expressed his willingness to pay up Rs. 15,000 and to take possession of the house. On this, Makund Ram Sukal backed out of his agreement and the meeting of the arbitrators closed that day in consequence. Again, on the 31st May, we the arbitrators, except Manikchand, went to *mouza* Bhonas to divide the house in question. At this time the property of the description of clothes, utensils, &c., was divided. Regarding the partition of the house both the brothers at our advice agreed to divide the house according to the plan drawn up by us on the same day. This plan shows the boundaries of the house. Both the brothers signed this plan and accepted partition according to it. They attested this partition before Mr. Nedham and us the arbitrators in whose presence it took place. They also took possession of their respective shares. Further, Makund Ram agreed to receive Rs. 1,000 as damages and cost of building walls, &c., and Tulsi Ram Sukal agreed to pay up the sum, and therefore Makund Ram is entitled to get this amount. The above partition took place with our unanimous opinion and full consent of both parties. Northern part of the house came into the share of Tulsi Ram, while the southern came into the share of Makund Ram."

The award then proceeds to divide the Harda villages. states that two lists were prepared by Makund Ram, one of Bhonas circle and the other of Pokharnee, the properties in them being found by the arbitrators to be of equal value. Tulsi Ram agreed to take Bhonas circle and Makund Ram, the award says, accepted Pokharnee of his own free will; that the arbitrators signed the lists, and both the brothers took possession of their shares. The list of the villages in each circle is given in the award. It then states that all the houses situate in Harda were divided on the 29th and 30th June with the unanimous consent of the arbitrators, and a plan drawn in English and Hindi was filed which showed what houses were allotted to Tulsi Ram and what to Makund Ram. One named house was to remain in the possession of Tulsi Ram, he paying Rs. 600 to Makund Ram. The award then states that the houses were divided by two lists being made and lots drawn. It then states that on the 2nd of August the arbitrators assembled to divide the remaining undivided property, and that they divided all the property according to the lists filed by Tulsi Ram in the manner after stated, but with the exception of grain the remainder of the award does not make a partition of the property, and it has been seen that Tulsi Ram in his written statement admitted this. An application to file the

1893-94

MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

award, under the provisions of section 327 of the Civil Procedure Code, was made by Tulsi Ram on the 21st January 1875 and was refused on the 29th March 1875 on the ground that the award was incomplete and incapable of execution.

In 1877 Makund Ram brought his suit for partition. It was first tried by the Deputy Commissioner of Nimar, who gave his judgment on the 18th September 1878. In it he found that soon after the arbitration commenced Makund Ram showed by his general behaviour and various overt acts his dissent from nearly all the decisions of the arbitrators as they were given from time to time, and that it was mainly due to his persistent obstructiveness that a full and complete award was not given, but that whether under protest or no he took possession of the share of the landed property that was awarded to him. The decree was that the plaintiff's claim for partition for such of the family property as was described in the award of the arbitrators should be dismissed, that the debts due to the family before the partition should be divided under the orders of the Court into two equal shares, and that the property described in the Schedules F. and G. should also be divided into two equal shares.

Makund Ram appealed to the Court of the Additional Commissioner, and the suit was on the 2nd April 1879 remanded by that Court in order that the value of the undivided property might be ascertained in such a manner as might enable the lower Court to divide it equally between the plaintiff and defendant. The proceedings on this remand were returned to the Additional Commissioner's Court of the Nerbudda Division to which the suit had been transferred, and it appearing that there was a technical objection which invalidated them the suit was on the 3rd January 1880 again remanded. After this there appears to have been great delay on the part of the Deputy Commissioner of Nimar, and the suit was, by an order of the 19th April 1883, transferred to the Court of the Deputy Commissioner of Hoshangabad. The record and proceedings, with a report of Commissioners of the 16th October 1883, having been returned by the Deputy Commissioner to the Commissioner's Court, Nerbudda Division, judgment was given on the 1st May 1884. In it the Commissioner

held that so much of the plaintiff's pleas in appeal as related to the arbitrators and their award had been disposed of by the Additional Commissioner's judgment of the 2nd April 1879, and made a decree upholding so much of the decree of the lower Court of the 18th September 1878 as dismissed the plaintiff's claim for partition of property divided by the award, and modified the rest of that decree by adopting the Commissioner's report of the 16th October 1883, and the lists marked 1, 2.

From this decree the plaintiff appealed to the Judicial Commissioner, and Tulsi Ram having died, Saliq Ram, his son and heir, was made respondent. On the 17th August 1885, on an objection by the plaintiff that the judgment of the Additional Commissioner of the 2nd April 1879 did not dispose of his objections to the decision of the Deputy Commissioner of Nimar of the 18th September 1878 in respect of the validity of the partition of property made by the arbitrators, and that the plaintiff was entitled to have those objections in appeal adjudicated on, the Judicial Commissioner held that the plaintiff was so entitled, and that it was not sufficient simply to ignore them; and the suit was remanded to the lower Appellate Court to decide the pleas in appeal against the decision of the first Court declaring that the partitions of property made in 1874 by the arbitrators or otherwise were valid and not liable to be disturbed. The judgment of the Commissioner on this remand was given on the 22nd April 1886, and being a judgment of a first Appellate Court it is, as regards the facts found, final.

It will be convenient here to notice that the objections taken in this appeal by Mr. Finlay on behalf of the plaintiff were that the award was bad, as it did not deal with all the matters submitted, and was uncertain, and that Makund Ram objected to go on and only did so under pressure. The judgment says: "I hold that the appellant has altogether failed to show that the reference to arbitration was made under misapprehension, and still less under compulsion. . . . As to compulsion it is absurd on the face of it, having regard to the plaintiff's age and position at the time, and to the fact that no one of the local authorities had any conceivable interest in bringing compulsion to bear on either party. . . . The point for determination seems to be what weight is to be

1893-94

MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

attached to the appellant's own signature of the document whereby he elected the Pokharnee *chuck*. On this point the document itself is the best evidence, and I entirely agree in the view urged by respondent's Counsel that this document represents an amicable division, voluntarily and deliberately made by both parties. Some inequality in the net profits of the *chucks* was apparent on the face of the lists when they were signed, but I must hold that the plaintiff knew quite well what he was about when he signed them, and that he signed deliberately .... As to the cash gold and ornaments I agree with the lower Court that they were amicably divided between the parties at the arbitrators' suggestion and instance. . . . As regards the house at Bhonas there is every reason to believe that the division was amicable and complete. As regards the Harda houses there is no evidence of inequality or unfairness in the award."

This judgment is a complete answer to the objection that Makund Ram was under pressure and was compelled to agree to the arbitration and to proceed with it. Also it is found as a fact that the parties agreed to and made a division of parts of the property without any condition that this was not to be final and was to be dependent upon the whole of the property being divided.

If the arbitrators had done this by their own authority only, the cases referred to by Mr. Finlay might have been applicable, but it was competent to the parties, when they were before the arbitrators, to agree to the division being made by steps, and that each division should be final. It was a convenient plan and it was for their interest to adopt it. They might waive the condition that a complete partition must be made of the whole of the property. The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so. Upon the facts which have been found by the first Appellate Court their Lordships think that the award, so far as it makes a division of the property, is valid.

A report of Commissioners as to the division of the property not divided by the award having been submitted to the Deputy Commissioner, he, on the 6th July 1887, submitted the papers to

the Court of the Commissioner of the Nerbudda Division, the Judge of which made a decree in these terms: "It is ordered that—(1) The arbitration award, dated 3rd September 1874, is upheld with respect to all property said in that award to have been divided; (2) that the undivided property will now be divided in accordance with the list appended to the Commissioner's report, dated 25th June 1887, which has been fully accepted except as regards the three villages of Sonkheri, Lakhanpur, and Samara. Those three villages will now be allotted to plaintiff Makund Ram, and defendant Saliq Ram will receive in lieu thereof Rs. 24,000."

BENGAL SECRETARIAT LIBRARY.

Saliq Ram appealed to the Judicial Commissioner, one of his grounds being that the lower Appellate Court ought to have awarded to him a half share of the villages and the rents and profits thereof, inasmuch as they were acquired by the use of joint family funds: and Makund Ram filed objections under section 561 of the Civil Procedure Code. The facts as to these villages are that one Khushal Patel owed a debt of Rs. 48,000 to the joint family of Makund Ram and Tulsi Ram, and that shortly after the award was delivered in 1874 Makund Ram, by means of a *benami* transaction, took Rs. 10,000 in cash and a conveyance in his son's name of the three villages in lieu of the joint debt. It was not disputed before the Judicial Commissioner that this was the result of the finding of facts in the Commissioner's report. The Judicial Commissioner modified the decree of the lower Appellate Court so far as it affected the three villages, and some land situate in the town of Harda, about which there is no question now, and decreed that the three villages should be divided equally between the parties, and that Makund Ram should pay to Saliq Ram Rs. 5,000, being half of the Rs. 10,000. Whether this is right is the only remaining question in this appeal. It seems to have been contended that the taking a conveyance in his son's name shows that Makund Ram intended to buy the villages for himself and not for the family, but the agreement to refer shows that family property might be in a son's name. Makund Ram might, as manager of the family property, and honestly, agree to this way of settling the debt of Khushal. He would have no authority, and it would be contrary to his duty as manager, or as

1893-94

MAKUND RAM SUKAL v. SALIQ RAM SUKAL.

a co-sharer, to make use of the debt for a purchase on his own account. It should be presumed, in the absence of evidence to the contrary, that he did what he might lawfully do, and their Lordships think the Judicial Commissioner has taken the right view of the transaction. They will, therefore, humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and of the lower Appellate Court, except so far as it is modified by the decree of the Judicial Commissioner and to dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant : Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent : Messrs. *Barrow & Rogers.*

C. B.

APPELLATE CIVIL.

1894 *Feb.* 28.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

GOLAP CHAND NOWLAKHA AND OTHERS (DEFENDANTS) *v.* ASHUTOSH CHATTERJEE (PLAINTIFF.) *

Bengal Tenancy Act (VIII of 1885), section 158—Tenure, Incidents of—Tenants, Applications against several—Form of Petition—Practice.

Section 158 of the Bengal Tenancy Act does not authorize one application being made against a number of tenure-holders having separate and distinct tenures. The proper procedure is by separate applications against each.

THE petitioner having, on the 25th June 1890, become the purchaser of *mehal* Huda Burnagar at a revenue sale under Act XI of 1859, and having taken delivery of possession through the Collectorate, applied in the Court of the Subordinate Judge of Murshedabad under section 158 of the Bengal Tenancy Act :

(*a*) to determine the names, places of abode and other particulars of the parties holding possession of *mouza* Girdgury appertaining to the purchased *mehal*, and also to determine what are the rights of such parties ;

* Appeal from Order No 114 of 1893 against the order of R. H. Anderson, Esq., Officiating District Judge of Murshedabad, dated the 10th of March 1893, reversing the order of Baboo Kali Churn Ghosal, Subordinate Judge of that district, dated the 18th of December 1892.

(*b*) to determine whether the second parties are liable to be ejected, and whether they have any right to retain the land they had been holding ; and also to determine to what class of tenants they belong, and whether the rents payable by them are liable to enhancement ;

(*c*) to determine what amounts and rates of rent are payable by the parties who have been holding possession of the *mouza*.

The petition contained the names of some twenty tenants as being the parties in possession of this *mozua*, and it was against these tenants as a body that the application was made.

Several of these tenants filed counter-petitions, in which they separately objected to the application on various grounds, all of them however taking the objection that the petitioner was not entitled under section 158 to make one joint application for the purpose of determining the incidents of the several tenancies held by his tenants as a body ; but that the application contemplated by the section was in the nature of a suit against each tenant separately.

The Subordinate Judge held that section 158 contemplated cases of individual tenants ; and that the provision of the Civil Procedure Code as to suits applied to applications under that section. He, therefore, rejected the application on the ground of misjoinder.

On appeal the District Judge was of opinion that the section gave to a zemindar the right of making one application which might embrace more than one tenancy, and was intended to provide a cheap method of settling disputes between landlords and tenants, one which could be easily worked and by which all matters in dispute between them could be dealt with together. He further was of opinion that the application was in the nature of a suit on the authority of *Petu Ghorai* v. *Ram Khelawan Lal* (1), but considered that Chapter IV of the Code of Civil Procedure did not stand in the way of the petitioner as no question of joinder of causes of action arose, it not being compulsory on him to state his

(1) I. L. R., 18 Calc., 667.

1894

GOLAP CHAND NOWLAKHA v. ASHUTOSH CHATTERJEE.

reasons for making the application. He therefore held, *first*, that the form of the application was not affected by the Civil Procedure Code; and, *second*, that there was nothing in section 158 to prevent the petitioner from making one application for the purpose of determining the incidents of the several tenancies referred to in the petition. He therefore allowed the appeal.

The tenants appealed to the High Court.

Mr. *Woodroffe* (with him Babu *Saroda Churn Mitter*) for the appellants contended that an application under section 158 against a number of tenure-holders holding separate and distinct tenures could not be maintained - citing *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1); *Debendro Kumar Bundopadhya* v. *Bhupendro Narain Dutt* (2), and distinguishing *Moheeb Ali* v. *Ameer Rai* (3.)

Dr. *Rash Behari Ghose* (with him Babu *Haraprosad Chatterjee*) for the respondent.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

In this case Ashutosh Chatterjee applied to the Court under section 158 of the Rent Act to have the nature of a large number of tenancies determined in one suit. In other words, he asked the Civil Court to do what the law declares in section 103 to be the peculiar duty of the revenue authorities.

The Subordinate Judge was of opinion that section 158 only referred to particular cases, and did not justify such an application. The District Judge, however, was of opinion that the section should be literally construed, and that the proceeding should be allowed, We think the Legislature did not contemplate that the several causes of action should be lumped up together. There is no procedure known to our law that recognizes the right to bring batches of suits in one claim. We direct that the decree of the lower Court be set aside, and that of the first Court affirmed with costs.

T. A. P. *Appeal allowed.*

(1) I. L. R. 15 Calc., 627. (2) I. L. R., 19 Calc., 182.
(3) I. L. R., 17 Calc., 538.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

ABDUL MAZUMDAR AND OTHERS (PLAINTIFFS) *v.* MAHOMED GAZI CHOWDHRY AND ANOTHER (DEFENDANTS) *

1894 *Feb.* 14

Sale in execution of decree—Decree obtained by fraud—Suit to set aside decree and sale in execution on the ground of fraud—Fraud—Civil Procedure Code, 1882, ss. 108 and 244.

A suit will lie to set aside a decree, and a sale held in execution of such decree, when both the sale and the decree are impeached on the ground of fraud. *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1) and *Jagan Nath Gorai* v. *Watson* (2), distinguished.

THIS was a suit brought by the plaintiffs to set aside an *ex-parte* decree for rent, obtained against them, and a sale of certain lands held in execution of that decree, and for a declaration of their title to the land and confirmation of their possession, on the allegation that the decree had been obtained by fraud, and that the execution proceedings and sale had been fraudulently conducted.

In the plaint they alleged that they had for a long time been in possession of the lands in suit as ryots, paying an annual rent of Rs. 10 to the defendant No. 1 and others, half that amount being paid to the defendant No. 1 and the remainder to his co-sharers. After setting out various proceedings, which they alleged the defendant No. 1 had previously taken with a view to dispossess them of their lands, the plaintiffs went on to state that in 1887 the defendant No. 1 instituted a suit against them claiming Rs. 11 as his share of the rent; that the summons in the suit was not served on them through the fraud of the defendant; that the defendant carefully kept all knowledge of the suit from them and caused a false *kyfiut* to be submitted by the serving peon; that thereafter on the 11th July 1887 he obtained an *ex-parte* decree, and in execution of that decree he, without serving the attachment *perwanna*, caused a false *kyfiut* of the attachment to be submitted by

* Appeal from Appellate Decree No. 1876 of 1892 against the decree of Babu Grish Chunder Chatterjee, Subordinate Judge of Tipperah, dated the 6th of August 1892, reversing the decree of Babu Ashootosh Banerjee, Munsif of Chandpore, dated the 29th of June 1891.

(1) I. L. R., 17 Calc., 769. (2) I. L. R., 19 Calc., 341.

1894

ABDUL MAZUMDAR v. MAHOMED GAZI CHOWDHRY.

the peon, and in like manner, without publishing the sale proclamation, caused a false *kyfiut* to be filed, and brought the lands to sale on the 6th August 1888, purchasing them himself for Rs. 10, which was a gross under-value; that on the 11th Bhadro 1296 (26th August 1889), when the defendant attempted to attach their moveable property for the purpose of realizing the balance alleged to be due under the decree, they for the first time learnt that such a suit had been instituted; that they paid up the balance alleged to be due to the peon and made enquiries and then discovered what had been done in the suit, and that the lands had been brought to sale and purchased by the defendant. They accordingly instituted this suit on the 4th November 1889 to obtain the relief above referred to.

Defendant No. 1 appeared and filed a written statement denying all the allegations as to fraud made by the plaintiffs, and pleaded limitation, and that the suit was bad by reason of multifariousness and misjoinder of causes of action. He specifically denied all the plaintiffs' allegations as to the non-service of the summons and non-publication of the attachment and sale proclamation, and contended that the decree and sale could not be set aside. Three issues were framed, *viz.*: (1) Is the suit maintainable? (2) Was the decree fraudulent? Can the decree and the sale in execution be set aside? And (3) are the plaintiffs entitled to any relief in this suit? Is the plaintiffs' claim for confirmation of possession maintainable?

The Munsif found all the issues in favor of the plaintiffs. He found that the defendant had not caused the summons in his suit, or any of the other process in the suit, to be served on the plaintiffs; that the decree had been fraudulently obtained and the sale proclamation never made, and he gave the plaintiffs a decree for the relief claimed by them. Upon the question as to whether the suit was maintainable he gave the following reasons for his decision:—

"The defendant No. 1 objects that this suit is not maintainable, as the plaintiffs could have applied for setting aside the decree under section 108 of the Civil Procedure Code.

"The objection is, I think, not valid. Art. 95 of the Limitation Act says that the period of limitation for a suit to set aside a fraudulent decree is three years. This shows that a

suit to set aside a fraudulent decree is maintainable. That the plaintiffs could get the remedy sought in this suit by an application under section 108 of the Civil Procedure Code is no bar to this suit."

The defendant No. 1 appealed. The following is the judgment of the Subordinate Judge :—

"The decree of the Munsif in favour of the plaintiffs in this case cannot be supported. Under the ruling of the Full Bench in *Mohendro Narain Chatvraj* v. *Gopal Mondul* (1) and the ruling in *Jagan Nath Gorai* v. *Watson* (2) the suit of the plaintiffs was not legally maintainable. The first issue framed in this case should have been decided in favour of the defendants and the suit dismissed with costs. The defendants might have as well applied to have the *ex-parte* decree set aside. The appeal is allowed and the decree of the first Court is set aside."

The plaintiffs now appealed to the High Court.

Babu *Aukhil Chunder Sen* for the appellants.

Babu *Rajendra Nath Bose* for the respondents.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows :—

This was a suit brought by the plaintiffs-appellants for declaration of their title to, and for confirmation of their possession of, certain immoveable property after setting aside an *ex-parte* decree and a sale in execution thereof, on the ground of the decree and the execution sale being fraudulent. The defence, which we need not here consider in detail, consisted in a denial of the plaintiffs' allegations. The first Court found that the decree in question was fraudulently obtained by the principal defendant against the plaintiffs, and that the sale in execution of such decree was also fraudulent and invalid, and it accordingly decreed the suit.

On appeal by the defendant the lower Appellate Court, without going into the merits of the case, has determined the suit as not "maintainable," relying upon the cases of *Mohendro*

(1) I. L. R., 17 Calc., 769. (2) I. L. R., 19 Calc., 341.

1894

ABDUL MAZUMDAR v. MAHOMED GAZI CHOWDHRY.

Narain Chaturaj v. *Gopal Mondul* (1) and *Jagan Nath Gorai* v. *Watson* (2).

In second appeal it is contended for the plaintiffs that this decision of the lower Appellate Court is wrong, and that the cases cited are clearly distinguishable from the present, inasmuch as not only the execution sale but the decree itself, in execution of which the sale took place, is here impeached on the ground of fraud.

We think the contention of the appellants is correct, and that the case must go back to the lower Appellate Court for trial on the merits.

In the cases relied upon by the Court of Appeal below it has no doubt been held that a judgment-debtor, seeking to impeach an execution sale at which the decree-holder is the purchaser, must proceed under section 244 of the Code of Civil Procedure, and that that section of the Code bars a fresh suit even when the sale is impeached on the ground of fraud. But those cases do not warrant the view taken by the Court below that a suit is not maintainable for setting aside, not only an execution sale, but also the decree itself in execution of which such sale was held on the ground of the decree and the sale being both fraudulent. On the other hand, we think there is ample authority in support of the view we take that such a suit would lie. In the case of *Nilmani Burnick* v. *Puddo Lochan Chuckerbutty* (3) which was a somewhat similar case, Sir Barnes Peacock, in delivering the judgment of the majority of the Full Bench, observed : "It is a cause of suit in the Civil Courts which have jurisdiction to administer the rules of equity, justice and good conscience, to set aside decrees obtained by fraud and to restrain the parties to the fraud from reaping the fruits of it by enforcing such decrees." And the observation of Garth, C.J., in the case of *Eshan Chundra Safooi* v. *Nundamoni Dassee* (4) may also be cited in support of the same view.

It was argued for the respondents that, as the non-service of summons is the only indication of fraud alleged in the plaint,

(1) I. L. R., 17 Calc., 769. (2) I. L. R., 19 Calc., 341.
(3) B. L. R., Sup. Vol., 379 ; 5 W. R., Act X., 20.
(4) I. L. R. 10 Calc., 357 (367).

1894

ABDUL MAZUMDAR v. MAHOMED GAZI CHOWDHRY.

the proper course for the plaintiffs was to proceed under section 108 of the Code of Civil Procedure for setting aside the *ex-parte* decree. But what is alleged in the plaint is not mere non-service but fraudulent suppression of the summons and the causing of a false return of service to be filed. And without in any way dealing with the facts of the case, which we cannot do in second appeal, or saying anything which would hamper the Court of Appeal below in the decision of the case on its merits, we may here observe that there is a material difference between mere non-service or absence of due service of summons, which is the result of mistake or inadvertence and the suppression of service, and the causing of a false return of service which must be the result of deliberate design.

Whether the decree sought to be set aside was obtained by fraud or not is a question of fact which it will be for the lower Appellate Court to decide. If it finds that the decree was fraudulently obtained, the suit would lie. But if it does not find that the decree is tainted by fraud, then the suit will not be maintainable.

The result then is that the decree of the lower Appellate Court will be set aside, and the case remanded to that Court to be tried on its merits.

Costs will abide the result.

H. T. H. *Appeal allowed and Case remanded.*

CRIMINAL REVISION.

1894 *March* 1.

Before Mr. Justice Beverley and Mr. Justice Hill.

BHOJAL SONAR AND OTHERS (PETITIONERS) *v.* NIRBAN SINGH AND OTHERS (OPPOSITE PARTY.)*

Costs—Criminal Procedure Code, section 148—Order for costs—Assessment of such costs by successor in office.

When a Magistrate passed an order for costs under section 148, Criminal Procedure Code, but did not state what the amount was to be, *held* that his successor in office had no jurisdiction to pass an order assessing such costs.

THE petitioners instituted criminal proceedings under section 145, Criminal Procedure Code, against Nirban Singh and others, and

* Criminal Revision No. 23 of 1894, against the order passed by C. F. O'Donnell, Esq., District Magistrate of Patna, dated the 13th of December 1893.

1894

BHOJAL SONAR v. NIRBAN SINGH.

the Sub-Divisional Officer (Mr. Leeds) of Barh, by an order dated the 24th of September 1888, gave the petitioners possession, and directed that the members of the second party should each pay his share of the total costs which was to be equally divided amongst the petitioners' ryots. The order did not mention what was to be the amount of the costs. Mr. Leeds was then transferred, and Mr. Hudda succeeded him at Barh. The petitioners then applied to Mr. Hudda to enforce the order for costs passed by Mr. Leeds, and Mr. Hudda, after hearing both parties, assessed the costs at Rs. 542. After some delay the properties of the second party were attached, and on the 26th of April 1893 Mr. Babonau, the then Sub-Divisional Magistrate of Barh, issued notices on the second party to show cause why their properties should not be sold on the 29th of July 1893 in execution of the order for costs. Mr. Babonau allowed the objections of the second party and refused to enforce the order passed by Mr. Hudda, thus virtually setting aside the said order. The petitioners then moved the District Magistrate of Patna and the application was dismissed. From this decision the petitioners moved the High Court in revision and a rule was issued, and on the rule coming on for hearing

Moulvie *Syed Mahomed Tahir* and Moulvie *Serajul Islam* appeared for the petitioners.

Baboo *Atulya Charan Bose* appeared for the opposite party.

Baboo *Atulya Charan Bose* showed cause.—The order of Mr. Babonau refusing to enforce the order of Mr. Hudda awarding costs against Nirban Singh and others is a perfectly good order. Section 148, Criminal Procedure Code, deals with the power as to awarding costs. The order is in the nature of a fine and a fine must be specific, see *Anonymous case* (1) and *Queen-Empress* v. *Husein Gaibu* (2). The Magistrate who made the order under section 145, Criminal Procedure Code, did not award any specific sum, therefore Mr. Hudda who succeeded him in office had no power to order a specific sum to be paid. The language of the section is clear. The power to award costs is not given to the Court passing an order under section 145, but to the individual Magistrate who has given a decision under that section.

(1) 5 Mad., 5. (2) I. L. R. 8 Bom., 307.

There are two unreported cases in my favor, see *Queen-Empress* v. *Sheikh Kaman* decided by Beverley and Ameer Ali, JJ., on the 10th November 1891, and *Queen-Empress* v. *Kunj Behari Lal* decided on the 31st January 1893.

Moulvie *Syed Mohamed Salim* in support of the rule.—The arguments of the other side are of a highly technical character. The Magistrate who passed the order under section 145 really awarded costs. He merely omitted, through an oversight, to name a specific sum, and what Mr. Hudda has done is to carry out his order after due inquiry by specifying a sum to be paid by the other side. The language of section 148, Criminal Procedure Code, clearly means the Court which passes the decision under section 145, not the individual Magistrate. If the construction sought to be put upon that section were correct, it would result in great hardship to litigants. It may be that the Magistrate passing the decision is transferred, as in the present case, and the officer succeeding him would be powerless to help a party in whose favor the original order has been passed and who would then be deprived of the costs incurred by him in the proceedings under section 145, Criminal Procedure Code.

The judgment of the Court (BEVERLEY and HILL, JJ.) was as follows :—

We are of opinion that we ought not to interfere with the order of Mr. Babonau, dated the 29th July 1893. We think that the action of Mr. Hudda in assessing, by his order of 5th May 1891, the costs which had been allowed by Mr. Leeds' order of the 15th September 1888, was without jurisdiction. In this view we are supported by a decision of this Court in the case of *Queen-Empress* v. *Sheikh Kaman* and others, first party, and *Jhonti Sing*, second party, decided on the 10th November 1891, in which the Court held that under section 148 of the Code of Criminal Procedure it was only the Magistrate who passed the decision, who was authorized to make an order regarding the payment of costs, and we think that the assessment of costs must be taken to be a necessary part of that order. We think, therefore, that, under the circumstances, Mr. Hudda had no jurisdiction to assess the costs in this case more than two

1894

BHOJAL SONAR v. NIRBAN SINGH.

years after the order for payment of costs had been made by Mr. Leeds, and that Mr. Babonau was justified in refusing to make an order to realize those costs. The rule is discharged.

C. S. *Rule discharged.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1894 *March* 30.

MAHOMED GOLAB (DEFENDANT) *v.* MAHOMED SULLIMAN (PLAINTIFF).*

Fraud—Suit in Recorder's Court to set aside for fraud decree obtained in Small Cause Court—Perjury.

A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story.

Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. But it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other side (which is fraud of the worst description) that he can obtain a rehearing of the questions in dispute in a fresh suit, by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favor it was given.

In this case a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Court of Small Causes at Rangoon on the ground that it had been obtained by fraud was held under the circumstances of the case to be not maintainable.

THIS was a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Judge of the Rangoon Court of Small Causes, on the ground that it was obtained by fraud. The plaintiff alleged that he, having been informed by one Molla Sulliman that he was about to go to his country and that

* Regular Appeal No. 307 of 1892 against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated 13th September 1892.

a debt was due to him, Molla Sulliman, by one Ismail Khan, was asked by Molla Sulliman to take a promissory note from Ismail Khan for the amount due for the purpose of recovering payment on behalf of Molla Sulliman. This the plaintiff agreed to do, and in the month of December 1891 Ismail Khan executed in favor of the plaintiff a promissory note for Rs. 2,000 on demand, which was given in lieu of a note executed on the 21st May 1891 by Ismail in favor of Molla Sulliman. The plaintiff then alleged that subsequently to this Molla Sulliman informed him that he was not going to his country, and asked the plaintiff to endorse the note over to one Mahomed Golab, which was done. Mahomed Golab then sued Ismail Khan and the plaintiff in the Small Cause Court on the promissory note. The day before the suit came on for hearing Molla Sulliman and Mahomed Golab (the defendant in this suit) and one Abdool Kader took the plaintiff to the house of Mr. Vertannos to whom the plaintiff admitted that he had endorsed the note. The plaintiff further alleged that he was told that he was required in the Small Cause Court as a witness only.

On the day of hearing the plaintiff attended at the Small Cause Court, when Ismail Khan admitted the execution of the note, and the present plaintiff admitted his endorsement. The present plaintiff was then told that a decree had been made against him ; he protested, and the Judge then stated that the case would be taken up as a contested case later on in the day. The plaintiff alleged that he was then told by Molla Sulliman and Abdool Kader that a release would be executed freeing him from all liability, and he was then taken to the Registration Office, and subsequently elsewhere, with the object of finding Mahomed Golab. Golab was not however found, and the present plaintiff alleged that he was driven from one place to another with Molla Sulliman and Abdool, until late in the afternoon (and on this point he was to some extent corroborated by other witnesses), and on reaching the Court he found that the decree, now sought to be set aside, had been passed against him in his absence.

Subsequently the present plaintiff applied to the Small Cause Court for stay of execution, stating that he was about to bring a suit to have the decree set aside. This application, however, was refused, and the plaintiff then brought the present suit on the

1894

MAHOMED GOLAB v. MAHOMED SULLIMAN.

allegations above mentioned to have the decree of the Small Cause Court set aside on the ground of fraud.

At the hearing and in the plaintiff's cross-examination the plaintiff admitted that when at Mr. Vertannes' house he had told that gentleman that he had received consideration for the note, and that he had then stated that he would confess judgment in the Small Cause Court. These facts he however subsequently later on in his cross-examination stated were untrue. The defence set up by Mahomed Golab was that Ismail Khan had borrowed on a promissory note a sum of Rs. 2,000 from the plaintiff, and that subsequently the plaintiff, being in want of the money, asked the defendant Mahomed Golab to lend him Rs. 1,900 on the security of this note, and that the defendant sent Rs. 1,900 to Ismail and the note was endorsed over to him. A further contention was that the plaintiff had in the Small Cause Court offered to pay Rs 1,000 on account to the plaintiff in the Small Cause Court suit.

The learned Recorder disbelieved the story told by the defendant, and though of opinion that the plaintiff's story was a remarkable one, considered that he had made out his case, and therefore decreed the suit in favor of the plaintiff, setting aside the decree of the Judge of the Small Cause Court so far as it affected him.

The defendant appealed.

Mr. *Braunfeld* (with him Babu *Sita Nath Das*) for the appellant.—If fraud was practised, plaintiff should have moved the Small Cause Court Judge for a review. See *Prudham* v. *Philipps* (1).

The suit was not decided *ex-parte*, because the plaintiff (then defendant) had put in an appearance, but left the Court when he should have waited. The suit is not maintainable; there is no authority for the proposition that a defendant against whom a suit has been decreed in a Small Cause Court can come into another Court as a plaintiff and sue to set aside the judgment of the Small Cause Court, on the ground that that Court had decided against him owing to the plaintiff in the Small Cause Court having practised a fraud upon him. The proper course was to apply to the Small Cause Court. *Prudham* v. *Philipps* (1); *Rex* v. *Duchess of Kingston* (2); Kerr on Fraud (2nd edition), 327.

(1) 2 Ambl., 763. (2) 2 Sm. L. C, 593: 20 How. St. Tr., 544.

There is no evidence of fraud having been practised by the defendant on the plaintiff, and no evidence of a conspiracy between the defendant and others. See *Patch* v. *Ward* (1); *Carew* v. *Johnston* (2); *Flower* v. *Lloyd* (3).

The plaintiff had admitted to Mr. Vertannes receiving consideration, and also admitted his endorsement. His language before Mr. Vertannes was that of a debtor and not that of an accommodator. His admission in Court and his subsequent departure showed he was a real debtor; he ought not to be allowed to blow hot and cold; a person who makes contrary allegations is not to be believed on the maxim *contraria allegans non est audiendus.*

When the plaintiff was asked to endorse the note Ismail was present. Why did he not tell Molla Sulliman to take a fresh note instead of endorsing, inasmuch as the object for which the note was taken by plaintiff did not require the plaintiff's help, as Molla Sulliman did not go to his country after all? If the money had been Molla Sulliman's he would not have witnessed the note, as there were others present to do so. If there was a conspiracy against plaintiff it would not have been carried out before so many people. The plaintiff's own witness proves that the plaintiff was aware that the summons was affixed on plaintiff's door. The plaintiff was in want of money at the time of the note as he was building a house.

Moulvi *Shamsool Huda* for the respondent contended that there was a conspiracy against the plaintiff in which the defendant was involved.

The following judgments were delivered by the Court (PETHERAM, C.J., and GHOSE, J.):—

PETHERAM, C.J.—Early in the year 1892 a suit was brought by Mahomed Golab, the present defendant, in the Small Cause Court of Rangoon, against Ismail Khan and Mahomed Sulliman, the present plaintiff, on a promissory note dated the 21st of May 1891, made by Ismail Khan in favour of Mahomed Sulliman and by him endorsed to the plaintiff.

The suit came on for hearing on the 17th of February 1892, when it appears from the record of the proceedings that Ismail

(1) L. R., 3 Ch., 203. (2) 2 Sch. & Lef., 308.
(3) L. R., 10 Ch. D., 227.

1894

MAHOMED GOLAB v. MAHOMED SULLIMAN.

Khan confessed judgment and Mahomed Sulliman, the present plaintiff, admitted his endorsement, and a decree was made in the plaintiff's favour against them both. On the 15th of March 1892, Mahomed Sulliman petitioned the Small Cause Court to stay execution on the ground that the decree had been obtained by fraud, and in his petition stated that he was about to take proceedings to have the decree set aside, and such further or other proceedings as he might be advised. This petition was rejected with costs on the 25th of March, and the plaint in the present suit was filed on the 28th of the same month in the Court of the Recorder of Rangoon. The nature of the relief sought, and the stories, both of the plaintiff and the defendant, are so fully and accurately described in the first three paragraphs of the learned Recorder's judgment, that it is only necessary for me to refer to those paragraphs here. The learned Recorder then goes on to say that he cannot believe the story told by the defendant, and that though the story told by the plaintiff is a remarkable one, he thinks on the whole he has made out a case ; but, if I understand him rightly, his principal reason for thinking so is that in his opinion the plaintiff had a good defence to the action on the note, and the decree ought not to have been made against him in the first action on the merits.

The question whether a suit will lie to set aside a decree of a Court of Justice on the ground that it was obtained by fraud is dealt with in the following cases :—

Raj Mohun Gossain v. *Gour Mohun Gossain* (1) was decided by the Privy Council in 1865. It was there held that a decree of an Appellate Court having been obtained after a compromise not to prosecute, the appeal was an adjudication obtained, not only with great impropriety but in effect by fraud and not binding upon the person who had been defrauded.

In *Patch* v. *Ward* (2) Lord Cairns, L.J., states the law as follows : "Now it is necessary to bear in mind what is meant, and what must be meant, by fraud, when it is said that you may impeach a decree, signed and enrolled, on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject—*The*

(1) 4 W. R., 47 : 8 Moo I. A., 91. (2) L. R., 3 Ch., 203.

Duchess of Kingston's case (1), where the Judges, being consulted by the House of Lords, replied to one of the questions: 'Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.' The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. And that that is so is, I think, further illustrated by looking at the form of decree which this Court is in the habit of making when a bill to impeach on the ground of fraud a decree signed and enrolled is successful. In *Carew* v. *Johnston* (2), Lord Redesdale made a declaration in these words: 'Declare that the several decrees and proceedings in the said cause instituted by the said late defendant, John Pine, deceased, against the said Thomas Pyke, deceased, and others, appear to have been erroneous and unjust, and to have been fraudulently obtained and had by the said John Pine, and by the defendant Johnston (who was the assignee of the said John Pine of the benefit of such suit, and the person really interested therein) by taking advantage of the real imbecility of mind of the said Thomas Pyke, and the embarrassed state of his affairs in Ireland, and the negligence and misconduct of those who, by reason of the incapacity of the said Thomas Pyke, took upon them the care and custody of his person and fortune, and treated him as a person of unsound mind and incapable of managing his affairs, without obtaining any authority to do so by suing out any Commission either in England or Ireland in the nature of a writ to inquire of the idiotcy or lunacy of the said Thomas Pyke.' I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled."

(1) 2 Sm. L. C., 593, 601. (2) 2 Sch. & Lef., 308.

1894

MAHOMED GOLAB v. MAHOMED SULLIMAN.

In *Flower* v. *Lloyd* (1), decided on appeal by James, Baggallay and Thesiger, L.JJ., the suit was dismissed on the ground that the fraud was not proved, but James, L.J., on his own behalf and that of Thesiger, L.J., said: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old Common Law action and the old Chancery suit, and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds." Baggallay, L.J., said: "I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it would be proper to deal with cases if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained

(1) L. R., 10 Ch. D., 327.

by the fraud of one of the parties, which judgment, but for such fraud, would have been in favour of the other."

The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed, but I am not aware that it has ever been suggested in any decided case; and in my opinion it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well. The reasons why this cannot be the case are very clearly stated by James, L.J., in the passage I have quoted, and it is because the reports in which those cases are to be found may not be accessible to some of the judicial officers in this country that I have quoted his remarks and those of Lord Cairns as fully as I have done.

The question then is: Does it appear from the evidence on this record that the plaintiff Mahomed Sulliman was prevented by the fraud of the defendant Mahomed Golab from placing his defence to this claim before the Small Cause Court Judge on the 17th of February 1892? The story which the plaintiff himself tells is that one day Sulliman Molla, Ismail Khan, who was the maker of the note, the defendant, who was the person to whom the plaintiff had endorsed it, and two other persons took him to the house of Mr. Vertannes, an Advocate at Rangoon, and the person who appeared for Mahomed Golab both in the Small Couse Court and in the Recorder's Court; and that when there he by the direction of Abdul Kader

1894

MAHOMED GOLAB v. MAHOMED SULLIMAN.

and Sulliman Molla told Mr. Vertannes that he had signed the note, had received the money, and would confess judgment in Court; that about fifteen days after Molla Sulliman said "I am going to sue Ismail Khan, come and give evidence;" that afterwards Sulliman Molla, Abdul Kader and the defendant took him to the Court, and upon his complaining that he had not received his *subpœna* or subsistence allowance, Sulliman Molla said that the money was with the peon and that he would be paid, and paid him Re. 1 out of his pocket; that the case was called on and the Judge asked him if he had signed the note, and when he said he had, the interpreter said "if Ismail Khan fails to pay, you will have to do so;" that he said he had not received any money but was merely asked to sign the document and did so; that thereupon all four cried out that a decree had been made against him, that he himself cried out and the Judge turned him out of Court. He does not say who were the four who cried out.

He then says that when he came out he spoke to Abdul Kader and Sulliman Molla and said: "I have given evidence according to your instructions and now I am told I shall have to pay," and they said that they would give him a registered release, and that he was not to be afraid if he kept quiet; that a little after Abdul Kader said "come home in a *gari* I will get money and write the release," and that this took place in front of the Registration Office where they took him; that then Abdul Kader called a *gari*, and he and the plaintiff drove to 33rd Street. Abdul Kader went to the house and left the plaintiff in the *gari*. He brought with him Sulliman Molla and Ismail Khan. Then Abdul Kader sent the plaintiff, Molla Sulliman, and Ismail Khan to the back of the Pagoda to No. 3 guard house on the Kokul side to bring defendant to have a deed of release written as the plaintiff was crying; that they drove out there and went to Minegoang, and that Molla Sulliman and Ismail Khan told the plaintiff to wait and they would search for and bring defendant. The plaintiff waited; that then a constable came to speak to the *gariwalla* and the constable asked why the plaintiff was crying, to which he said that a fraudulent case had been brought against him by two persons, and that they had gone out and he was waiting for them. At about 5 or 5-30 those persons returned; that the plaintiff waited

from 2 P. M. They left at 1 or 1-30 and got back at 6. They all came together. He says that Sulliman Molla, Abdul Kader, Ismail Khan, defendant, Fakir Ahmed and Saimulla, the writer of the note, Mahomed Ismail and Fareed Sahib were all present when Ismail signed the note ; that after the decree was made, the plaintiff spoke to these people about the release ; he spoke to defendant. They did not give it to him and he consulted a lawyer and instituted this suit.

The learned Recorder has accepted this story—first, because he thinks it is corroborated by other witnesses ; and, secondly and mainly, as I understand him, because he does not believe that the defendant gave value for the note, and he has decreed the suit. I am unable to agree with him in his view of the facts.

I cannot find in this record any evidence which would corroborate the statement of the plaintiff, if he had made such a statement which is by no means clear, that he was induced by the fraud of the defendant not to defend the action. There is no doubt independent evidence that he was at the places he mentioned in the company of Abdul Kader and Sulliman Molla, but this may quite well have been the case, and still there may be no truth in the statement that he had been defrauded by the defendant. On this question of corroboration it will be useful to study the case of *Queen-Empress* v. *Ram Saran* (1) in which Straight, J., collects the English cases.

It is an elementary principle that a person who charges another with fraud must himself prove the fraud, and it is very certain that the plaintiff is not relieved from this obligation because the defendant has himself told an untrue story. In the present case it is quite likely that the learned Recorder may be right in his view of the defendant's evidence, but whether that is true or not I find myself unable to believe that of the plaintiff, and if he is not believed his case must fail. He admits that when it suited him to do so he told Mr. Vertannes that he endorsed the note and received the money. He now says that was untrue, and that he did not receive it. For my part I see no more reason for believing one story than the other, and I think it impossible to act on the unsupported testimony of a man who admits that he tells what-

(1) I. L. R., 8 All., 306.

1894

MAHOMED GOLAB v. MAHOMED SULLIMAN.

ever story suits him at the moment without reference to its truth.

For these reasons I am of opinion that the action cannot be maintained, and that this appeal must be allowed and the suit dismissed with costs in both Courts.

GHOSE, J.—I agree with the Chief Justice in thinking that the suit should be dismissed. Upon the evidence, I do not think it has been satisfactorily proved that the decree of the Small Cause Court was obtained by the fraud of the defendant Mahomed Golab.

T. A. P.

Appeal allowed.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

1894 *March* 31.

MAHMUDI SHEIKH (COMPLAINANT) *v.* AJI SHEIKH (ACCUSED.)*

Recognizance to keep peace—Criminal Procedure Code, 1882, ss. 106, 349—Procedure to be followed by Magistrate trying a case when he is not empowered to bind the accused down under 106 of the Criminal Procedure Code.

An Honorary Magistrate exercising third class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of Rs. 10, or in default to suffer seven days' rigorous imprisonment. He further submitted the case to the District Magistrate with a recommendation that the accused should be bound down to keep the peace under section 106 of the Criminal Procedure Code, and the District Magistrate ordered the accused to furnish security.

Held, that the order of the District Magistrate was illegal and must be set aside.

Before an order under section 106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a third class Magistrate, and the order must be passed by the Magistrate who convicts and passes the sentence.

THIS was a reference by the Sessions Judge of Mymensingh under section 438 of the Code of Criminal Procedure.

It appeared from the letter of reference that the complainant, on the 20th November 1893, filed a complaint against the accused

* Criminal Reference No. 74 of 1894 made by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 5th March 1894.

Aji Sheikh, charging him with having committed offences under sections 147, 352 and 426 of the Penal Code. The complainant was examined by Mr. Radice, the Assistant Magistrate, before whom the complaint was made over for disposal, and he was directed by him to bring his lease and *kabulyat* in proof of his possession and also adduce evidence of neighbours. It further appeared that in a counter case of Aji Sheikh against Mahmudi Sheikh, which came up on the same date, Mr. Radice recorded an order, stating that it appeared to be true, and directed it to be put up with the other case on the 2nd December.

On the 2nd December the case was made over to the Bench for disposal by Mr. Earle, the District Magistrate, and on that day it was taken up by Babu Gor Mohan Basak, an Honorary Magistrate, who, it appeared, had power to try cases singly as a third class Magistrate. It did not appear that any process was ever issued against Aji Sheikh, but on the 2nd December he attended the Court as complainant in his own case, and was then ordered as an accused to give bail in the case against him, and was ultimately convicted by the Honorary Magistrate under section 447 of the Penal Code and sentenced to pay a fine of Rs. 10, or in default to suffer rigorous imprisonment for seven days. At the same time the Honorary Magistrate referred the case to the District Magistrate, recommending that the accused should be bound down under section 106 of the Code of Criminal Procedure to keep the peace. The District Magistrate thereupon, without hearing anyone on behalf of the accused, directed him to furnish security to keep the peace.

Upon these facts being brought to the notice of the Sessions Judge, he referred the case to the High Court, giving the following as his reasons :—

"There have been many irregularities in this case. They are as follows :—

"1. The case having been referred to the Bench for disposal the Honorary Magistrate had no jurisdiction to try the case. He could only do so upon its being transferred to him by the Magistrate of the district originally under section 192, Criminal Procedure Code, or referred to him for trial after withdrawal or recall from the Assistant Magistrate, or the Bench under section 528, Criminal Procedure Code. The proceedings of the Honorary

1894

MAHMUDI SHEIKH v. AJI SHEIKH.

Magistrate would appear to be void under section 530, Criminal Procedure Code.

"2. The Honorary Magistrate appears to have acted irregularly in proceeding to convict and sentence the accused when he was of opinion that he ought to be required to execute a bond under section 106, Criminal Procedure Code. Section 349, Criminal Procedure Code, directs that whenever a Magistrate of the second or third class having jurisdiction is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to be required to execute a bond under section 106, Criminal Procedure Code, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate.

"The Honorary Magistrate should not have proceeded to record a conviction and pass sentence, but should have left the whole case open to the Magistrate of the district.

"3. The District Magistrate acted irregularly: (*a*) By passing an order on the accused to execute a bond under section 106, Criminal Procedure Code, in a case thus irregularly referred to him. (*b*) By passing that order without giving the accused an opportunity of being heard by his pleader. An accused has a right to be defended by a pleader (section 340, Criminal Procedure Code.) The accused, in proceedings submitted under section 349, Criminal Procedure Code, has a right to be present at the proceedings taken by the Magistrate on receipt of these proceedings—*Queen* v. *Gunesh Sircar* (1); *Reg.* v. *Ragha Naranji* (2).

"I submit to the Hon'ble Court that the accused has been prejudiced throughout. He has been prejudiced by having been tried by a non-stipendiary sitting alone instead of by the Bench, and he has been prejudiced in his appeal. To what Court can he now appeal against the order of the third class Magistrate?

"I submit that for the above reasons the proceedings of the District and Honorary Magistrates should be set aside."

No one appeared on the hearing of the reference.

The opinion of the High Court (PRINSEP and HILL, JJ.) was as follows:—

A Magistrate exercising powers of the third class convicted Aji Sheikh of criminal trespass under section 447, Indian Penal Code, and sentenced him to a fine of Rs. 10, or, in default, to rigorous imprisonment for seven days. He further submitted the case to the District Magistrate, with a recommendation that the accused should, under section 106 of the Code of Criminal Procedure, be bound over to keep the peace. The District Magistrate

(1) 7 W. R., Cr., 38. (2) 7 Bom. H. C., Cr. Ca., 31.

has required Aji Sheikh to furnish security to keep the peace, and the matter is now before us in revision on a reference by the Sessions Judge.

We are of opinion that the order of the District Magistrate is illegal and must be set aside. The order of the District Magistrate professes to have been made under section 349 of the Code of Criminal Procedure. That section, however, contemplates that when the Magistrate having jurisdiction over the offence under trial finds the accused guilty of that offence, but considers that he is not competent to pass punishment of an appropriate description or sufficiently severe to meet the ends of justice, he should submit the entire proceedings for the orders of the District Magistrate or the Sub-Divisional Magistrate to whom he may be subordinate; and the section is further extended so as to enable him to deal in the same way with a case in which he is of opinion that the accused ought to be required to execute a bond under section 106. But we observe that in such a case the order directing the particular punishment to be awarded, that is to say, the conviction and sentence, should be passed by a superior Magistrate. In this particular instance, the sentence was passed by an inferior Magistrate, that is, by a Magistrate of the third class, and the proceedings were then submitted to the District Magistrate to be dealt with under section 106. Consequently the case is not within the terms of section 349. If we next consider the terms of section 106 they contemplate that, before an order requiring security to keep the peace can be passed under it, the accused shall have been convicted by some Court or Magistrate specified, not being of a class inferior to that of a Magistrate of the first class. Reading these two sections together, therefore, we have no doubt that it was the intention of the Legislature that, before an order under section 106 can be properly passed, the conviction of the accused shall have been by an order made by a Magistrate of a superior class, and not, as in the present case, by a Magistrate of the third class. The terms of section 106, which enable any of the Courts or Magistrates specified to require the execution of a bond to keep the peace, direct that such an order may be passed at the time of passing sentence on such person. This also shows that the intention of the Legislature

1894

MAHMUDI SHEIKH v. ALI SHEIKH.

was that the conviction and order under section 106 shall be passed by one and the same officer. For these reasons we are of opinion that the order under section 106 must be set aside. There are other objections taken to the proceedings in this case which it is unnecessary to mention.

H. T. H. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1894 *March* 5.

BEJOY CHAND MAHATAB BAHADUR, MINOR, REPRESENTED BY HIS NEXT FRIEND AND GUARDIAN LALA BUN BEHARI KAPUR, MANAGER (PLAINTIFF) *v.* KRISTO MOHINI DASI AND ANOTHER (DEFENDANTS).*

Limitation Act (XV of 1877), Schedule II, Article 14—Suit to set aside an act or order of an officer of Government—"Ultra vires"—Bengal Act VI of 1870, ss. 48, 64—Chaukidari Chakran Land, Settlement of.

Under section of 48 of Bengal Act VI of 1870 a Collector can only settle lands with the zemindar within whose estate the lands lie. Section 64 of that Act does not empower the Commissioner to set aside an order passed by the Collector under section 48.

Art. 14 of Schedule II of the Limitation Act does not apply to a case where the order is an absolute nullity.

THE plaintiff, who was a minor and the Maharajah of Burdwan, through his next friend and guardian instituted this suit for a declaration that certain *chaukidari chakran* land situate within *mouzah* Kowarpur, of which the Maharajah of Burdwan was the owner, and which was at the time of suit in possession of the principal defendant Kristo Mohini Dasi, and her adopted son, had been settled with the plaintiff's predecessor in title; that the Collector had no power to settle it with any one else; and that a *pottah* granted by him to defendant No. 1 was inoperative; and he prayed for possession of the land to be given him with mesne profits.

It appeared that in 1882 proceedings were taken under the provisions of Bengal Act VI of 1870 by the Collector with a view

* Appeal from Appellate Decree No. 1974 of 1892 against the decree of Babu Kadar Nath Chatterji, Subordinate Judge of Beerbhoom, dated 12th of September 1892, reversing the decree of Babu Behari Lall Mookerjee, Munsif of Suri, dated 17th of August 1891.

to resume the land in dispute, which measured some 21 bighas and 7 cottahs, and the land was measured and the *jama* fixed by the *panchayat* at Rs. 27 odd. The then Maharajah of Burdwan, Maharajah Aftab Chand Mahatab, considering this *jama* excessive, petitioned the Collector, praying for a revision, with the result that the *jama* was fixed by a Sub-Deputy Collector at Rs. 2 a bigha, or some Rs. 40 odd for the whole land. Maharajah Aftab Chand Mahatab objected to this, but his petition to have the land settled with him was rejected, and on the 8th July 1882 an order was passed by the Collector directing the settlement to be made with the defendant No. 1 who was a neighbouring zemindar. The Maharajah then appealed to the Commissioner, who, on the 1st September 1882, reversed the Collector's order. It appeared that on the order being made by the Collector a transfer in the form of Schedule C of the Act was drawn up and signed by that officer but did not issue from his office. After the order of the 1st September 1882 it appeared that the question of resumption of the *chakran* lands in that district was kept in abeyance for some time and no further steps were then taken.

Maharajah Aftab Chand died on the 24th March 1884, leaving him surviving his widow, Maharani Bondei Debi, who was then a minor, and who subsequently adopted the plaintiff as son to her late husband on the 31st July 1887. On the 17th June 1887 Maharani Bondei Debi applied to the Collector for a deed of transfer of the disputed *chakran* land, but the Collector, notwithstanding the order of the Commissioner of the 1st September 1882, rejected her petition, and on the 17th August 1887 ordered a *pottah* to be issued to the defendant No. 1, and the defendants Nos. 1 and 2 accordingly got possession of the land.

This suit was instituted on the 16th August 1890, and the Secretary of State was made a party defendant, but he did not appear at the hearing or file any written statement. The plaint set out the facts and claimed the relief above stated.

Defendants Nos. 1 and 2 filed a written statement, in which, while they did not dispute the main facts alleged in the plaint, they alleged that Maharajah Aftab Chand had given up his rights to the land, and they disputed the fact that the Commissioner had on the 1st September 1882 reversed the order of the Collector of

1894

BEJOY CHAND MAHATAB BAHADUR v. KRISTO MOHINI DASI.

the 8th July. They contended, further, that such a suit would not lie in the Civil Court, and that it was barred by limitation, the period for such a suit, assuming it to lie, being, as they contended, one year running from the date of the Collector's original order.

The Munsif found that there was no evidence to show that Maharajah Aftab Chand had given up his rights to the land, and held that there was nothing to prevent such a suit being brought. He held that the suit was not barred by limitation; that the Collector had exceeded his powers in granting the *pottah* to the defendant; that the plaintiff was entitled to have a settlement of the land and to obtain possession thereof with mesne profits, and he decreed the suit accordingly. Upon the question of limitation and the powers of the Collector to grant the *pottah* to the defendant he gave his reasons as follows:—

"The first point for determination is from what time limitation would run. It is argued for the defence that limitation would run from the 8th July 1882 when the *pottah* granted to defendant No. 1 on the 17th August 1887 was signed and sealed. On the other hand, it is argued on the plaintiff's side that limitation would run from the last mentioned date when the *pottah* was issued It appears that after the rejection of the plaintiff's predecessor Maharajah Aftab Chand's petition for a settlement of the disputed *chakran* lands with him, and the passing of the order for granting the *pottah* to defendant No. 1 by the Collector in July 1882, the said predecessor of the plaintiff preferred an appeal to the Commissioner of the division, who reversed the order of the Collector on the 1st September 1882. So everything that was done by the Collector was also reversed and the *pottah* can't be said to have been in force at the time. The Chaukidari Act (Bengal Act VI of 1870) was in abeyance in this district for some time. The parties did not take any steps in the matter till the 17th June 1887, when Maharani Bondei Debi, the wife of Maharajah Aftab Chand, who was then dead, applied to the Collector for a settlement of the lands with her. This petition appears to have been rejected on the 18th June 1887. The defendant No. 1 then applied to the Collector for the *pottah* on the 8th August 1887 and the *pottah* was granted to her on the 17th August 1887. Under such circumstances I find that limitation cannot run from the 8th July 1882, but should run from the 18th June 1887 or from the 17th August 1887.

"The next point for determination is whether or not the plaintiff has come into Court within time from either of the said dates. It is proved that Maharajah Aftab Chand died on the 24th March 1884 and was succeeded by his wife Maharani Bondei Debi, who at the time of his death was also a minor and was succeeded by the minor plaintiff, her adopted son. So whether the period of limitation be one year under Art. 14 or three years under Art. 51 as urged by the defendants' pleader, or six years under Art.

120, Schedule II of the Limitation Act as urged by the plaintiff's pleader, it does not matter ; the plaintiff's case is clearly within time under section 7 of the Act, and the case of *Khodabux* v. *Budree Narain Singh* (1) and that of *Mon Mohun Buksee* v. *Gunga Soondery Dabee* (2).

* * * *

"I find that the Collector of Birbhum exceeded his powers in granting a lease of the land in suit to defendant No. 1. Under clause 4, section 8, Regulation I of 1793, the *jama* of the zemindars was fixed, exclusive of the produce of any lands which they may have been permitted to appropriate for keeping up *thanas* or police establishments, and the Governor-General in Council reserved to himself the option of resuming the produce of such lands in consequence of having exonerated the proprietor of land from the charge of keeping the peace, etc. Then under section 41, Regulation VIII of 1793, the *chakran* lands were annexed to the *malguzari* lands and declared responsible for the public revenue assessed on the zemindaries in common with all other *malguzari* lands therein. So that on resumption of *chaukidari chakran* lands, it is provided by section 48 of Act VI of 1870 that such lands shall be transferred, etc., to the zemindar of the estate or tenure within which they may be situate. Then by sections 49 and 50 it is provided that the transfer is to be made at half the assessment to be fixed by the *panchayat* and approved or revised and approved by the Collector, the zemindar being at liberty to contest the assessment before it is approved. It is then provided in the last portion of section 50 that 'after such approval the Collector of the district shall, by an order under his hand in the form in Schedule C, transfer to such zemindar such land subject to the assessment so approved.' So there is no discretion left, and the Collector is bound to transfer the *chaukidari chakran* land to the zemindar of the estate comprising the said land.

"In the present case the *panchayat* fixed the assessment at Rs. 27-13 annas 7 gundas 2 cowries. The plaintiff's predecessor objected to the assessment, and the Sub-Deputy Collector was appointed to revise the assessment. He submitted a report to the Collector fixing the assessment at Rs. 2 per bigha, *i.e.*, at Rs. 40 11 annas 12 gundas. From the record called for from the Collectorate, there does not appear any express approval by the Collector. Again it appears that the plaintiff's predecessor's petition of the 10th Assar 1294 (17th June 1887) was rejected on an incorrect report submitted by the Head Clerk, who stated that the settlement of the *chakran* lands in village Kowarpur was made with Kristo Mohini Dasi (defendant No. 1), zemindar of the neighbouring village on the 18th July 1882. The fact of the order for the said settlement having been reversed by the Commissioner in appeal No 3T., and distinctly mentioned in the said petition of the 17th June 1887, was not brought to the notice of the Collector.

(1) I. L. R., 7 Calc., 137. (2) I. L R., 9 Calc., 181.

1894

BEJOY CHAND MAHATAB BAHADUR v. KRISTO MOHINI DASI.

Then it appears from the petition of Kristo Mohini Dasi, dated the 8th August 1887, that she obtained the *pottah* on a misrepresentation of the facts. In it she distinctly stated that on account of the settlement of the *chakran* lands of Kowarpur (the disputed lands) with her, the zemindar of Kowarpur (the Maharajah of Burdwan) appealed to the Commissioner, that the appeal was dismissed and that the *pottah* would be granted to her.

For all these reasons I hold that the Collector had no power to lease out the land in suit to the defendant No. 1, and that the defendants Nos. 1 and 2 are not entitled to retain possession of it."

The defendants appealed to the Subordinate Judge who reversed the decree and dismissed the suit with costs. It appeared that only two points were argued on the appeal, *viz.*, the question of limitation and the question as to whether Maharajah Aftab Chand had relinquished his rights. The Subordinate Judge decided the latter point in favour of the plaintiff, but as regarded the former, he considered that one year was the proper period of limitation to apply to the case, and that it must be taken to run from the 8th July 1882, the date of the Collector's order, as no appeal lay to the Commissioner, and he had no authority to set aside the Collector's acts, his powers being clearly defined by section 64 of the Act. He therefore held that as Maharajah Aftab Chand did not die till the 24th March 1884, more than a year had elapsed from the date of the order, and that the suit was barred by limitation. The plaintiff appealed to the High Court.

Babu *Hem Chunder Banerjee* for the appellant.

Babu *Bhawany Churn Dutt* and Babu *Boidya Nath Dutt* for the respondents.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

TREVELYAN, J.—The real question in this case is one of limitation. This question depends upon whether Art. 14 of the second schedule of the Limitation Act applies, and, if it does so apply, from what date limitation begins to run.

The land in dispute in this suit was *chaukidari chakran* land situate within the estate of which one of the former Maharajahs of Burdwan was the proprietor. In 1882 proceedings, purporting to be under section 48 and the following sections of Bengal Act VI of 1870, were commenced.

The Maharajah contested the assessment, and on the 8th of July 1882 by a petition asked the Collector to settle the land with him. On the 8th of July 1882, the Collector refused this application, and ordered the land to be settled with the first defendant, who was the zemindar of adjacent lands. A transfer in the form of Schedule C of the Act was drawn up and signed by the Collector, but did not issue from his office.

The Maharajah then preferred an appeal to the Commissioner of the division, who set the order of the Collector aside on the 1st of September 1882.

I may say in passing that apparently this order of the Commissioner was *ultra vires*, and indeed the learned pleader for the appellant has not very seriously contended that it was *intra vires*. The powers of the Commissioner under the Act are defined by section 64, which provides as follows: "The Commissioner of circuit shall have a general controlling power over all proceedings of *panchayats* and Magistrates and Magistrates of districts under this Act." Section 1 of the Act defines the "Magistrate of the district" as "the Chief Officer charged with the executive administration of a district in criminal matters by whatsoever designation such officer is called." So apparently the Commissioner can only control the action of the Magistrate when he is acting in his capacity as administrator of a district in criminal matters. He was here acting as Collector, *i.e.*, as administrator of the district in revenue matters. In the view that I take of this case it is not absolutely necessary to determine whether the order of the Commissioner was valid, but as far as I can see it was not. If it were valid there is an additional reason for this suit not being barred.

As far as I can gather proceedings to resume *chakran* land seem then to have been kept in abeyance for about five years. In the 12th paragraph of the plaint the plaintiff says: "This plaintiff has come to learn and believes that after the said order had been passed the question of resumption of *chakran* land was kept in abeyance for some time under orders from Government." The defendants did not deny this in their written statement. A similar statement was made before us and was not contradicted. While these proceedings were in suspense the Maharajah died,

1894

BEJOY CHAND MAHATAB BAHADUR v. KRISTO MOHINI DASI.

leaving an infant widow, who, while still an infant, adopted the present plaintiff, who also was and is still an infant. On the 17th of June 1887, the Maharani, who apparently had not then adopted, applied to the Collector for a deed of transfer. This application was refused on the next day.

On the 8th of August 1887, the defendant No. 1 applied to the Collector to issue to her the deed of transfer which had been signed in 1882. By an order of the 17th of August it was ordered to be so issued.

On this state of facts I have come to the conclusion that it is not necessary to sue to set aside the order of the Collector made in 1882.

The limitation provided in Art. 14 only applies where it is necessary to set aside an order before relief can be obtained. The order of the Collector was, in my opinion, clearly *ultra vires*. He had not under the Act any power to transfer the land to any one except the Maharajah.

Section 48 says that the land shall be transferred in manner and subject as thereinafter mentioned (*i.e.*, as to the fixing of the assessment) to the zemindar of the estate or tenure within which may be situate such land. There is no power whatever to transfer to any one else, and any such transfer would necessarily be an entire nullity. The Collector has no more power to transfer this land to any one other than the zemindar than any private individual has.

It is not necessary to sue to set aside an order which is an absolute nullity. Such order can be treated as of no effect whatever. If authority were wanted for such a proposition it can be found in the cases of *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri* (1) and *Nagu* v. *Salu* (2).

In the former case, at page 432 of the report, Mr. Justice West, with the concurrence of Mr. Justice Birdwood, says: "There are other orders not within the scope of the authority of the official who makes them *ratione materiæ*. He affects to deal with something in its nature or legal character beyond the range of his functions. In the case of such an order carried out in the way of dispossession, we do not think that the person injured is

(1) I. L. R., 11 Bom., 429. (2) I. L. R., 15 Bom., 424.

deprived of his remedy, or restricted in his resort to the Law Courts, merely by the orders being signed by the Collector or other official. The order is, in the case supposed, legally a nullity; the dispossession is an act of force as if it had been effected by a mere private individual." In the latter case Mr. Justice Jardine approves of Mr. Justice West's decision, and Mr. Justice Candy, who, on other grounds, differed from Mr. Justice Jardine as to the particular case before them, says: "Had the order passed by him not been *primâ facie* within the scope of his authority, *ratione materiæ*, then section 135 would not apply. So, too, had he affected to deal with something in its nature or legal character beyond the range of his functions, his order would have been legally a nullity, and there would have been no need for plaintiff to bring a suit to set it aside." It is clear from Mr. Justice Bayley's judgment in the same case that he approves of this proposition.

In the present case I think that the order of the Collector in 1882 can be treated as an absolute nullity, and that it neither bars nor restricts the plaintiff's right of suit.

Had I come to the conclusion that Art. 14 of the Limitation Act applied to this suit, I think I must have held that time began to run, not from the order of 1882, but from the issue of the transfer in 1887. The proceedings were in abeyance, and if the Maharajah had then sued to set aside the order of 1882 the answer would probably have been that, until he had issued the transfer, there was nothing to prevent the Collector cancelling it. The proceedings of 1887 shew that another order was under the circumstances necessary before it would be issued. The proceedings of 1887 were in continuation of those of 1882, and show that the proceedings of 1882 had not terminated by a final order.

In my opinion this appeal should be allowed and the decree of the Munsif restored with costs in the lower Appellate Court and in this Court.

RAMPINI, J.—I agree. I would add that if the order of the Collector dated 1882 be held to be a good order, then it must be regarded as set aside by the order of the Commissioner. Both orders seem to me to stand on the same footing as regards jurisdiction. In that case, the suit is not barred by limitation; for limitation would not begin to run till 1887, and the plaintiff's

1894

BEJOY CHAND MAHATAB BAHADUR v. KRISTO MOHINI DASI.

adoptive mother having been a minor, and the plaintiff being himself still a minor, the suit is in time. If, on the other hand, it be held that the Commissioner's order is void for want of jurisdiction, then the Collector's order of 1882 must be regarded as inoperative for the same reason. I can make no distinction between the two orders as regards validity.

I therefore concur in allowing this appeal with costs.

Appeal allowed.

H. T. H.

INSOLVENCY.

1894 *April* 11.

Before Mr. Justice Sale.

IN THE MATTER OF F. DE MOMET, AN INSOLVENT.

Insolvent Act (11 & 12 Vic., c. 21), s. 5—Jurisdiction—Residence—Insolvency.

There is nothing to show that the residence contemplated by section 5 of the Insolvent Act must necessarily be a permanent residence; the object of that section being to extend the benefit of the Act to those who could be said to be *bonâ fide* residents, for the time being, within the jurisdiction of the Court at the time they filed their petitions.

APPLICATION for personal discharge.

It appeared that the insolvent, who described himself as "at present residing at the Great Eastern Hotel in Old Court House Street in the town of Calcutta, who for some years prior and down to the commencement of the year 1893 resided and carried on the business of an indigo planter at the Busharutpore Indigo Concern in the District of Jaunpore in the Benares Division of the North-Western Provinces, and from that time down to 1893 resided at and worked as Superintendent of the Dooteriah Tea Gardens in the District of Darjeeling, at present out of employ," filed his petition in insolvency on the 8th January 1894. His schedule showed the name of one creditor only, such creditor having obtained a decree against the insolvent on the 1st June 1888 for Rs. 75,000. The hearing of the insolvent's petition came on before Mr. Justice Sale.

Opposition to the discharge of the insolvent was entered

by the sole creditor on, amongst other grounds, the ground that the Court had no jurisdiction, inasmuch as the insolvent was not a British subject, and was not resident in the town of Calcutta, but had merely come there for the purpose of filing his schedule. On this point the insolvent being examined by Mr. *Dunne* gave the following evidence: "I went to England last year. I was Manager of a tea garden in the Dooars belonging to the estate of the late Mr. Brougham. In November last I received notice of dismissal, and left England to return to India, where I arrived on the 28th December 1893. On arrival I put up at the Great Eastern Hotel, having no other residence, and having no work, nor any promise of employment on arrival. I filed my schedule on the 8th January 1894 after consulting my attorney. I remained at the Great Eastern Hotel till the 16th January, and then went up to the Dooars, returning to Calcutta again on the 6th of February, and remaining there till the 14th March. I then went back to a friend who offered me board and lodging in return for my looking after a portion of his work, and I have been working in that way ever since. Beyond this I have received no promise of any work from any body. My object in returning to Calcutta was to look out for work in tea. I did not come to Calcutta merely for the purpose of filing my schedule. I was born in India, my father having been in India for many years in the indigo line. I was married here and my daughter was born here; she is now in England."

To Mr. *T. A. Apcar* the insolvent said: "I put up at the Great Eastern Hotel, knowing that it was the most likely place to meet planters, and that I should have thus a chance of obtaining employment."

Mr. *T. A. Apcar* for the opposing creditor.—On this evidence it is clear that the Court has no jurisdiction. The reported cases have never gone the length of laying down that a stay in Calcutta for ten days to look out for employment amongst tea planters constituted "residence" within the meaning of the Insolvent Act so as to give the Court jurisdiction. There must be shown an intention to remain in the place for a time; in this case the insolvent had never intended to remain in Calcutta, but had merely come to obtain employment. I refer

1894

IN THE MATTER OF DE MOMET.

to *In re Blackwell* (1), *In re Tietkins* (2) and *In re Ram Paul Singh* (3).

Mr. *Dunne* for the insolvent.—Section 5 of the Act uses the word "reside." The insolvent was residing in Calcutta when he filed his petition, therefore *primâ facie* the Court has jurisdiction. It is for the other side to show that what was residence *primâ facie* was not really residence at all within the meaning of the Act. The ground on which the cases have gone is that owing to want of *bona fides* or on some such cause, that which was *primâ facie* residence was not residence at all within the meaning of the Act. The decision of Broughton, J., in *Ram Paul Singh's case* proceeds on the ground that there was some other Court which had jurisdiction in insolvency to which the petitioner could have and ought to have applied. If the decision is not put on that ground, the decision is clearly wrong. In this case this Court is the sole Court to which the application could be made. It is clear that the petitioner has no other residence in India. Section 5 does not mean that the residence must be of a permanent nature; and the intention of the insolvent as to residence cannot affect the matter: see *In re Tietkins* (2). It is clear that the insolvent was acting entirely *bonâ fide*, and though the actual time of his residence in Calcutta before filing his petition was only eleven days, still such a residence is quite sufficient under the circumstances of the case.

SALE, J.—I think I must hold that this Court has jurisdiction to entertain this petition. The insolvent was an indigo planter for many years and subsequently a tea planter. Some time in 1879 a decree was obtained against him for a large sum of money. It was provided in that decree that a certain sum should be paid by him towards satisfaction of the decree. Every month the amount payable under that decree has been paid in, and payments were continued till the end of December 1893. Early in 1893 the insolvent, then Superintendent of a garden in Darjeeling District, went to England on leave accompanied by his daughter. The family of the insolvent consists of himself, daughter and wife. The wife appears to be mentally affected and has been for some time past

(1) 9 Bom. H. C., 461. (2) 1 B. L. R. O. C., 84.
(3) 8 C. L. R., 14.

in St. Vincent's Home. While in England the insolvent obtained the information that the garden which formed part of the estate of Doctor Brougham was to be sold in course of administration, and accordingly on 1st November 1893 he communicated with the Bank in this country to transfer a sum of Rs. 5,000 odd, which stood to credit of his account with the Bank, to the name of his daughter. He was then purposing to return to this country and leave his daughter behind in England, and his object in making the transfer was to provide for his daughter who was left in England, and also to enable her to support the mother in this country. Very shortly afterwards he was dismissed by the proprietors of the garden, inasmuch as it appeared there was some question as to how long the garden was to be carried on, and he was offered either payment of three months' salary in lieu of notice, or the option of returning to this country and rejoining his appointment for that period. He accepted the former and accordingly his connection with this country entirely ceased on the 11th November 1893. He then determined to come out to this country to seek for employment in tea in which his experience had been gained. He came out, and on arrival at Calcutta he took up his abode at the Great Eastern Hotel, intending to stay there till he obtained employment. His object, he says, in going to the Great Eastern Hotel was that it was a place much frequented by persons interested in tea, and he would be more likely to hear of employment likely to suit him at that place. He made enquiries of various persons of whom he had knowledge, but was unable to obtain any offer or promise of work. Then, he says, finding there was no prospect, the season being advanced, of obtaining any work, and seeing no possibility of paying the moneys due under the decree, he was compelled to seek the assistance of the Insolvent Court. He went to his attorneys, and on the 8th January his petition was filed. On the 16th January he left Calcutta on a visit to the Dooars, returning again to Calcutta in February, and after a short stay in Calcutta obtained the offer of work on a tea estate in the Dooars on the terms of obtaining his board and lodging. That offer he accepted, and that post he still holds. The question is whether at the time of his filing his petition here on the 8th January he was residing within the jurisdiction of this Court within the meaning of section 5

1894

IN THE MATTER OF DE MOMET.

of the Insolvent Act. I am quite satisfied on the evidence of Mr. De Momet that his conduct has been *bonâ fide* throughout. The sum transferred was the savings between the amount he was by the decree ordered to pay to his creditor, Rs. 300 a month, and the full amount of his salary, and he considered he was entitled to deal with this amount in the way he did. The question as to what is a sufficient residence to give juirsdiction to this Court has been the subject of judicial determination more than once. As far as I understand no case goes to the length of holding that residence under section 5 must be a permanent residence. It seems to me the object of the section is to extend the benefits of the Insolvency Act to those who are *bonâ fide* residents within the jurisdiction at the time of the filing of the petition. The term is used to distinguish the position of such persons from that of a person who merely comes in and uses his presence within the jurisdiction as the means of obtaining the benefit of the Act, and it also has the effect of excluding persons merely in the position of visitors. The cases show moreover that great stress is laid upon the fact as to whether or not the person said to reside within the jurisdiction had at the time any other residence elsewhere It is quite clear from the facts of this case that the insolvent had no place of residence outside the jurisdiction of this Court, and if the insolvent was not residing within the jurisdiction at the time he filed his petition it is difficult to say he was residing outside the jurisdiction.

Moreover, under sections 16 and 17 of the Code of Civil Procedure a very short period of actual living or dwelling within the jurisdiction of a Civil Court has been held sufficient to constitute residence so as to give such Court jurisdiction in suits by or against persons said to be residing within its jurisdiction. Under all these circumstances I think the facts here show that the insolvent was residing within the jurisdiction of this Court at the time when his petition of insolvency was filed. The cases which have been cited, *viz.*, *In re Tietkins* (1) and *In the matter of Ram Paul Singh* (2) are I think distinguishable. In the first case the insolvent had a permanent residence outside the

(1) 1 B. L. R., O. C., 84. (2) 8 Cal. L. R., 14.

1894

IN THE MATTER OF DE MOMEY.

jurisdiction, and in the second case the insolvent was a native of this country who had his family residence at Bhaugulpore. His dwelling house had been sold no doubt, but still his wife and family were residents of that place. It would seem in that case the insolvent's coming down to Calcutta was only for the purpose of filing his petition in this Court, and the fact of residence in Calcutta was not made out.

I do not think either of these cases affects the conclusion I come to on the present facts.

Personal discharge granted.

Attorneys for the Insolvent: Messrs. *Orr, Robertson & Burton.*

Attorneys for the opposing creditor: Messrs. *Leslie Bros.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali

1894 *Feb.* 20.

TINCOURI DEBYA (JUDGMENT-DEBTOR) *v.* SHIB CHANDRA PAL CHOWDHURY AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Property outside jurisdiction of Court—Jurisdiction—Mortgage decree—Attachment, Absence of, on sale of mortgaged property—Civil Procedure Code, 1882, ss. 19, 223.

A Court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion of the property be situate outside the local limits of its jurisdiction.

Gopi Mohan Roy v. *Doybaki Nundun Sen* (1) followed; *Prem Chand Dey* v. *Mokhoda Debi* (2) distinguished.

The omission to cause an attachment to be made in execution of a decree for the realization of a mortgage debt does not affect the validity of a sale of the mortgaged property in execution of such decree.

THIS was an appeal from an order passed by the Subordinate Judge of Nuddea on the 14th January 1893, refusing to set aside the sale of certain mortgaged properties held in execution of a decree, dated the 9th February 1880. Some of the properties

* Appeal from Original Order No. 98 of 1893, against the order of Babu Gopaul Chunder Banerjee, Subordinate Judge of Nuddea, dated the 14th of January 1893.

(1) I. L. R., 19 Calc., 13. (2) I. L. R., 17 Calc. 699.

1894

TINCOURI DEBYA v. SHIB CHANDRA PAL CHOWDHURY.

covered by the mortgage were situate in the districts of Burdwan and Hughli, and it was contended that the Subordinate Judge of Nuddea had no jurisdiction to sell these properties in execution of the decree, and that the sale was bad by reason of there having been no previous attachment.

The Subordinate Judge, having refused to set aside the sale on the ground that the judgment-debtor had failed to prove the grounds on which he sought to have it set aside, passed an order confirming the sale, and it was against that order that the judgment-debtor now appealed.

Babu *Srinath Dass* and Babu *Sarat Chunder Roy Chowdry* for the appellant.

Babu *Rash Behary Ghose* and Babu *Hara Prasad Chatterjee* for the respondents.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was delivered by

PRINSEP, J.—The proceedings now before us relate to a sale held in execution of a decree passed by the Subordinate Judge of Nuddea. The suit was brought on a mortgage bond, by which certain properties which had been brought to sale were hypothecated, some of these properties being situated beyond the ordinary local jurisdiction of that Court. The Subordinate Judge had full jurisdiction to deal with such a case and to pass a decree in respect of such properties. The appeal now before us is from on order of the Subordinate Judge refusing to set aside the sale held in execution of that decree.

Two points are raised in this appeal: *first*, that the Subordinate Judge had no jurisdiction to sell certain properties beyond his ordinary local jurisdiction, although they may form part of the decree properly delivered by him under which the sale has been held, inasmuch as such properties being situated in another district, the sale of these properties should have been held by the Court having ordinary local jurisdiction, and the decree for such properties should have been transferred to such Court for execution; *secondly*, that the sale held without an attachment previously made was bad.

On the first point it is necessary only to refer to the judgments

1894

TINCOURI DEBYA v. SHIB CHANDRA PAL CHOWDHURY.

of this Court. In the case of *Prem Chand Dey* v. *Mokhoda Debi* (1) it was held that, although a Court may have had jurisdiction to pass a decree directing the sale of properties covered by a mortgage, still, if the area within which such properties were situated had been transferred to another jurisdiction after decree, it was not competent for that Court to proceed to execute such decree. In that case, however, the Court had no jurisdiction at all to execute the decree so as to sell any of the mortgaged properties, since they had all of them ceased to form part of the local jurisdiction of the Court after the decree had been made. The case of *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (2) is, however, directly in point. In that case, as in this, the decree related to properties within and without the ordinary local jurisdiction, and it was held that consequently that Court was competent to execute its decree to its fullest extent, even to the sale of properties outside its local jurisdiction. We concur in the view expressed by the learned Judges in that case. It seems to us, moreover, that it would be impossible to apply the provisions of the Transfer of Property Act relating to sales in accordance with the decree passed in a suit on a mortgage, if it were necessary to apply to different Courts to obtain realization of the mortgage debt by sale of the properties hypothecated. There is nothing, moreover, in the terms of the Code of Civil Procedure itself which would deprive the mortgagee of this very necessary power.

In regard to the second point, we have been referred to the case of *Kishory Mohun Roy* v. *Mahomed Muzaffar Hossein* (3), in which the object of an attachment before decree, and the effect of an omission to cause such attachment to be made, are fully discussed. I was one of the Judges who decided that case. We see no reason to differ from the view therein expressed. We should not be inclined to hold that the omission to cause an attachment to be made in execution of a decree for the realization of a mortgage debt would affect the validity of a sale held in execution of such decree. For these reasons we are of opinion that this appeal should be dismissed with costs.

H. T. H. *Appeal dismissed.*

(1) I. L. R., 17 Calc., 699. (2) I. L. R., 19 Calc., 13
(3) I. L. R., 18 Calc., 188.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

1893
Dec. 11

QUEEN-EMPRESS *v.* SAGAL SAMBA SAJAO AND OTHERS.*

Witness—Examination of witnesses—Cross-Examination—Right of accused to cross-examine witnesses for the prosecution before commitment—Criminal Procedure Code (1861), s. 194; (X of 1872), s. 191; (X of 1882), ss. 207, 208, 210, 256, 257, 288—Criminal Procedure Code, 1882, s 364—Recording statement of accused by Magistrate.

An accused person has the right to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The fact that the Criminal Procedure Code of 1872 contained an express provision to that effect, which was omitted in the Code of 1882, together with the provision of sections 210 and 256 of the later Code, must not be taken to show an intention on the part of the Legislature to deprive an accused of that right. The express provision in the Code of 1872 was probably thought by the Legislature, when framing the Code of 1882, as being redundant, seing that the Evidence Act of 1872, which was passed at the same time as the Criminal Procedure Code of 1872, made sufficient provision on the subject. Section 256, moreover, does not prohibit cross-examination before a charge is framed; it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time subject to a discretion given to the Magistrate by section 257.

Where depositions of witnesses for the prosecution before the Magistrate previous to commitment were taken without any cross-examination by the accused being allowed, it was held that such depositions were improperly treated as evidence in the Sessions Court, as they had not been "duly taken" in the presence of the accused within the meaning of section 288 of the Code.

Where an accused, a Manipuri, was examined before the Magistrate through an interpreter, who obtained his answers in Manipuri, and they were recorded in that language, and the interpreter translated them into Bengali, and they were recorded by the Magistrate in English, and the statement in English and that in Manipuri were found to differ: *Held* that the statement recorded in Manipuri must be taken to be the record in the case. Had the Manipuri statement not been made, the Magistrate by recording the statement in English would not have strictly complied with the spirit and intention

* Criminal Reference No. 43 of 1893 in Appeals Nos. 868 and 880 of 1893, made by John Clark, Esq., Officiating Sessions Judge of Silchar, dated the 29th September 1893.

of section 364 of the Criminal Procedure Code, though the record in English might not necessarily have been inadmissible in evidence.

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

IN this case seven persons, Sagal Samba Sajao, Chouba Singh, Nasiba Nengthonba, Madan Hijapa, Cheubangbang Sajao, Amur Feberi, and Sarba Singh, were charged under section 396 of the Penal Code with dacoity in the course of which murder took place.

The facts on which the charge was made are fully set out in the judgment of the High Court. There were nine persons implicated originally, but two of them, Mukhta and Mohan, had pardon tendered to them and were made approvers under section 337 of the Criminal Procedure Code. The accused were tried by the Officiating Sessions Judge of Silchar with two assessors. The assessors found all the accused not guilty, being of opinion that the evidence of the approvers, on which the prosecution almost wholly depended, was tutored.

The Judge found them all guilty ; four of them, Sagal Samba Sajao, Chouba Singh, Nasiba Nengthonba and Madan Hijapa, who he found took a leading part in the commission of the crime, he sentenced to death ; the other three accused were sentenced to transportation for life.

The case, so far as regarded the prisoners sentenced to death, was referred to the High Court for confirmation of the sentence ; and all the prisoners appealed to the High Court on the following grounds :—

That the Sessions Judge had erred in his estimate of the evidence in the case ; that the Sessions Judge had erred, both in law and on the merits, in dealing with the evidence of the two approvers who have been examined as witnesses in the case ; that the Sessions Judge was wrong in refusing permission to the petitioners to inspect the two depositions, recorded by Mr. Lees, first class Magistrate, of the said approvers ; that the Sessions Judge has erred, both in law and on the merits, in dealing with the evidence in the case, which is supposed to corroborate the evidence of the said approvers, and in convicting the petitioners thereon ; that the Sessions Judge has erred in his estimate of the conduct of the petitioners in its bearing on their supposed guilt ; that the Sessions Judge has erred, both in law and on the merits, in dealing with the statement of the woman Sadi, and in not summoning

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

either Mr. Howell or the Assistant Superintendent of Police in connection with the said statement of the woman Sadi; that the Sessions Judge has erred, both in law and on the merits, in dealing with the so-called confession of the petitioners' co-accused Sagal Samba Sajao; that the Sessions Judge was wrong in using, to the petitioner's prejudice, materials which either were not or could not be made evidence in the case; and that the Sessions Judge was wrong in refusing the petitioners' access to certain statements of witnesses for the prosecution recorded otherwise than by the committing Magistrate.

Mr. *J. T. Woodroffe*, Mr. *P. L. Roy*, Babu *Boidonath Dutt*, Moulvie *Syed Shumsul Huda*, Babu *Sarat Chandra Roy Chowdhry*, Babu *Atulya Charan Bose*, and Babu *Joy Gobind Some* for the accused.

Mr. *C. P. Hill* for the Crown.

Mr. *Woodroffe* contended that the statement made by the accused Sagal was inadmissible in evidence. It was made in Manipuri; questions were put to him by the Magistrate through an interpreter; the answers were given in Manipuri and translated by the interpreter into Bengali; the answers however were not recorded in Bengali but in English; this was not in accordance with the law: see sections 164 and 364 of the Criminal Procedure Code. The statement should by these sections have been recorded in Manipuri, or at any rate in Bengali; if that were impracticable the prosecution ought to show that it was so, otherwise the statement is not admissible in evidence: see *Queen-Empress* v. *Nilmadhab Mitter* (1); *Empress* v. *Vaimbilee* (2); *Jai Narayan Rai* v. *Queen-Empress* (3); and *Queen-Empress* v. *Viran* (4). The case of *Fekoo Mahto* v. *Empress* (5) is distinguishable. This statement moreover was repudiated as soon as the accused for the first time understood what had been recorded, and another statement was made before the Judge which contained no confession or admission. The earlier statement having been repudiated was not admissible as evidence in the Sessions Court; *Reg* v. *Garbad Bechar* (6), and *Queen* v. *Gonesh Koormee* (7). *Reg* v.

(1) I. L. R., 15 Calc., 595.
(2) I. L. R., 5 Calc., 826.
(3) I. L. R., 17 Calc., 862.
(4) I. L. R., 9 Mad., 224.
(5) I. L. R., 14 Calc., 539.
(6) 9 Bom., 344.
(7) 4 W. R. Cr., 1.

Thompson (1), was also referred to. The statement was also made under pressure put upon the accused, and inducement held out to him, and it was therefore not admissible with reference to section 24 of the Evidence Act. As to the principles on which confessions are admitted or rejected as evidence, *The King* v. *Warwickshall* (2), and *Reg v. Thompson* (1), in which that case was approved of, were cited; the prosecution must show affirmatively that the confession was not obtained by pressure or inducement. *Hall's case*, cited in the note to *Lamb's case* (3), *Reg* v. *Boswell* (4), and the cases mentioned in Russell on Crimes, Vol. III, p. 442, *et seq.*, and page 449, were referred to. As to the statement being evidence against the other accused under section 30 of the Evidence Act, it was not a confession of any offence with which they stood charged as required by that section. It must be shown that it implicated the confessing person to the same extent as the other accused: *Queen* v. *Belat Ali* (5), and *Empress* v. *Ganraj* (6). As to the dying declaration of the woman Sadi it was clearly admissible in evidence. [Mr. *Hill*, who appeared for the prosecution, said that was so, and he had no objection to its being admitted.]

The learned Counsel then referred to certain discrepancies which existed in the evidence of some of the witnesses in their statements made in the Magistrate's Court and in the Sessions Court, for doing which without putting in the former statements he referred as authority to the case of *Empress* v. *Haran Chunder Mitter* (7). With reference to the evidence of the approvers Mukhta and Mohan Singh it was contended that, inasmuch as the provisions of sections 337, 338 of the Criminal Procedure Code had not been complied with, they had not been properly admitted as approvers; no reasons were recorded at the time as should have been done; they were not followed by any discovery by the police due to the disclosures made in them; and they were therefore not admissible in evidence under section 27 of the Evidence Act; *Adu Shekdar* v. *Queen-Empress* (8), and *Queen-Empress* v. *Kamalia* (9). There were in them conflicting statements as to material

(1) (1893) 2 Q. B., 12.
(2) 1 Leach., 263, 298.
(3) 2 Leach, 559.
(4) 2 Cr. and M., 584.
(5) 10 B. L. R., 458.
(6) I. L. R., 2 All., 444.
(7) 6 C. L. R., 390.
(8) I. L. R., 11 Calc., 642.
(9) I. L. R., 10 Bom., 595.

1893

QUEEN-EMPRESS v. SAGAL SAMDA SAJAO.

particulars; but even supposing they agreed in every particular, confirmation of such evidence was just as requisite where there were several approvers as where there is only one; Russell on Crimes, Vol. III., p. 609; *Queen* v *Noakes* (1) and *Stubb's case* (2). There was no sufficient corroboration of the evidence of the approvers; none, especially as to the identity of the accused with the persons who committed the acts charged; *Rex* v. *Wilkes* (3), and *Reg* v. *Farler* (4), which were followed in the Full Bench decision in *Queen* v. *Elahi Bux* (5), *Queen* v. *Nawab Jan* (6), *Queen* v. *Mohesh Biswas* (7), *Queen-Empress* v. *Arumuga* (8), and *Queen-Empress* v. *O'Hara* (9). These statements of the approvers were not admissible in evidence, and a conviction could not be sustained upon the previous statement of witnesses uncorroborated by any other evidence; *Queen* v. *Amanulla* (10), *Kala Chand Sircar* v. *Queen-Empress* (11), and *Queen-Empress* v. *Rangi* (12). Here too the statements had not been duly taken under section 288 of the Code of Criminal Procedure, and the accused were not allowed their right of cross-examining the witnesses; see section 138 of the Evidence Act. That right was refused to the prisoner; see *In re Dhan Mandal* (13): the evidence was therefore not duly taken in the presence of the accused. As to the Judge having referred to and taken as substantial evidence against the accused, police diaries, *Queen* v. *Hurdut Surma* (14) and *Callan's case* (15), were referred to.

Mr. *Hill* for the Crown.—The examination of No. 1 accused by the Magistrate before tendering him a pardon was irregular, but he may have *bonâ fide* believed that he was justified in doing so, and was thereby securing the ends of justice. Here a pardon has to be tendered if it is wished to call one accused as a witness to convict the rest. In England the prosecution has the

(1) 5 C. and P., 326.
(2) 1 Dears. C. C., 555.
(3) 7 C. and P., 272.
(4) 8 C. and P., 106.
(5) B. L. R. Sup. Vol., 459 : 5 W. R. Cr., 80.
(6) 8 W. R. Cr., 18.
(7) 19 W. R. Cr., 16.
(8) I. L. R., 12 Mad., 196.
(9) I. L. R., 17 Calc., 664.
(10) 12 B. L. R., Ap., 15 : 21 W. R. Cr., 49.
(11) I. L. R., 13 Calc., 53.
(12) I. L. R., 10 Mad., 313.
(13) 6 C. L. R., 53.
(14) 8 W. R. Cr., 68.
(15) 1 Leg. Rem. Punj. Cir. Orders, 21st May 1869.

right to call on the Court to acquit one of the accused with the same object.

As to the accused not being allowed to cross-examine the witnesses, there is some doubt whether, under the Criminal Procedure Code, they have the right to do so before commitment, so that the Judge might be excused for thinking they had not such a right, and section 138 of the Evidence Act does not deal with the rights of the accused, but only with the order in which the proceedings are to be conducted. The doubt as to their right to cross-examine before commitment and the framing of the charge arises on the provisions of the Criminal Procedure Code itself. Under the former Codes of Criminal Procedure the right to cross-examine before commitment was expressly given (see Act XXV of 1861, section 194, and Act X of 1872, section 191) as it is given in England: see Burn's Justice of the Peace, Vol. V., Title "Petty Sessions." and as by Statute 11 and 12 Vict. c. 42, section 17, the right to cross-examine before commitment was given when the offence was indictable. But under the present Criminal Procedure Code, Act X of 1882, the provisions giving that right appear to have been deliberately omitted. Section 207 of the Act says that the Courts are "to take the evidence in the manner hereinafter provided;" but the manner hereinafter provided is left in considerable doubt. Under sections 209, 210, *et seqq.*, it is optional with the Magistrate to go into the defence of the accused, so that there are doubts as to whether the right to cross-examine does exist. Sections 244 and 252 to 256 of the Code were referred to, section 256 allowing the accused, while putting forward his defence, to recall and cross-examine the witnesses, and it was pointed out that that right could be defeated by the prosecution sending their witnesses out of Court and keeping them out of reach. [PRINSEP, J.—The accused could summon them under section 257. AMEER ALI, J.—Do not sections 256 and 257 sufficiently show that the right exists?] No, for the Legislature thought it necessary (as was done in England) to expressly declare the right, which they did in the earlier Codes, whereas in the Code of 1882 they have omitted it. There are different views as to the intention of the Legislature in the wording

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

of the Code in this respect, and a definite ruling as to the point in a trial at which it is allowable for the accused to cross-examine the witnesses for the prosecution is desirable. Sir R. Couch, C.J.. In the case of *In re Thakoor Doyal Sen* (1), said it was a doubtful point; that was a case under the old Code. What I wish to point out is that the Magistrate may have had a *bonâ fide* opinion that the accused had no right to cross-examine. There is ambiguity in the wording of the section, and in *Queen-Empress* v. *Namdev Satvaji* (2), it has been held that the Magistrate ought to commit the accused when he thinks the evidence is enough to put the accused on his trial. By section 347 moreover he has power to stop the proceedings at any stage of the case, and that he might do during the examination of the first witness for the prosecution.

As to the alleged differences in the translation of the recorded statements, were the accused prejudiced by them? if not they were not fatal to the prosecution: see section 537 of the Criminal Procedure Code and the case of *Reg* v. *Deva Dayal* (3).

As to the approvers, it rested with the Court to decide whether, having previously made a statement incriminating themselves, these two persons should have been made approvers; they were unnecessarily offered a pardon and made approvers instead of accused. The object of section 337 of the Criminal Procedure Code was to enable the Crown to obtain evidence, not to tender a pardon when the evidence to be obtained had already been obtained It was however for the Court to see whether the conditions of section 337 had been complied with. With reference to the statement in the Magistrate's Court having been put in by the Sessions Judge as contradicting the accused No. 1, the object was to get at the truth which the Judge thought he was doing in taking that course. Section 157 of the Evidence Act allows a former statement made by one of several accused at or about the time of the occurrence to be proved. The Court might refer to previous inconsistent statements of a witness for the purpose of convicting or acquitting the accused: *Queen* v. *Majohur Roy* (4). Whether that was a safe doctrine to adopt it was for the Court to decide. The observations

(1) 17 W. R. Cr., 51.
(2) I. L. R., 11 Bom., 372.
(3) 11 Bom., 237.
(4) 24 W. R. Cr., 11.

in *Queen* v. *Amanulla* (1), pointed not to the admissibility of the evidence, but to the mode of using it. The case of *In re Dhan Mundul* (2), was similar to the present case, yet the decision there was against the accused, and see *Queen* v. *Wazira* (3).

As to the confession or statement of accused No. 1 not being taken according to law, an examination of the authorities showed that this was not made clear: *Queen-Empress* v. *Nilmadhub Mitter* (4), *Jai Narayan* v. *Queen-Empress* (5), and *Lal Chand* v. *Queen-Empress* (6) were referred to. With reference to the alleged improper use of police diaries a case of *Queen* v. *Hurdut Surma* (7), had been cited; but Petheram, C.J., in a case referred to in the note to section 164 of Mr. Justice Prinsep's edition of the Criminal Procedure Code, said Magistrates and Judges ought to make use of them, and that was what the Sessions Judge had done.

The confession of an accused person might be recorded without the questions put to him, provided that the omission did not affect the meaning of the statement he made. *Empress* v. *Munshi Sheikh* (8). The confession could be used against the man who made it with regard to the dacoity; a confession need not go the length of detailing all the circumstances of a crime. As to the admissibility of it against the other accused, the case of *Queen* v. *Belat Ali* (9) was cited to show that it must implicate the other accused to the same extent as the one who made it: the Court was entitled to look at the circumstance of the murder which supported the confession. Section 30 of the Evidence Act does not require the confession to be made at any particular time as the illustrations to the section show. This statement implicated three of the accused equally with the man who made it. According to the case of *Empress* v. *Gauraj* (10), the confession is not to be taken into consideration unless it is sufficient by itself to justify a conviction, but it is submitted it was permissible to supplement the confession with any clear evidence there might be of the commission of the offence charged.

(1) 12 B. L. R., Ap. 15: 21 W. R. Cr., 51.
(2) 6 C. L. R., 53.
(3) 8 B. L. R., Ap., 63.
(4) I. L. R, 15 Calc., 595.
(5) I. L. R., 17 Calc., 862.
(6) I. L. R., 18 Calc., 549.
(7) 8 W. R., Cr., 68.
(8) I. L. R., 8 Calc., 616.
(9) 10 B. L. R., 453.
(10) I. L. R, 2 All., 444.

1893

QUEEN-EMPRESS v. SAGAL SAMDA SAJAO.

As to the detention of the accused in police custody section 167 of the Code of Criminal Procedure was referred to, under which a Magistrate might authorize such detention for a term not exceeding 15 days. [Mr. *Woodroffe*.—Section 167 must be read with section 344 : see the case of *Empress* v. *Engadu* (1). PRINSEP, J.—Section 167 requires a Magistrate to record his reasons for detention but here he has not done so.] The learned Counsel then went into the alleged cases of police oppression, and the evidence as to the motive of the crime. In a criminal case on appeal by the accused there is no presumption of innocence as there is in the Court of first instance. The accused now must show that the evidence was insufficient to convict them, and that the conclusion of the lower Court was wrong. [PRINSEP, J.—In capital sentence cases the practice of this Court in otherwise].

Mr. *Woodroffe* in reply, with reference to the last observation, referred to *Protab Chunder Mookerjee* v. *Empress* (2), the question to be considered is whether the conviction is right.

As to the right of cross-examination, the word "examination" includes cross-examination and re-examination, although it is not defined at all in the Codes. The law as to it is laid down in the Evidence Act, whilst the Procedure Code deals only with the circumstances under which, and the stages at which, witnesses may be called. Section 208 of the Criminal Procedure Code provides, not only for hearing the complainant, but also for taking evidence on behalf of the accused, and some cross-examination was contemplated by sections 256, 257. The case of *In re Thakoor Doyal Sen* (3), did not go so far as it was sought to make it go. It was the duty of the Magistrate to allow the cross-examination. Section 537 of the Code only applies to unintentional irregularities. In *Empress* v. *Viraperomal* (4), a judicial officer intentionally omitted to administer an oath, and it was held that section 537 did not cure the irregularity. That case was under section 5 of the Oaths Act, but that section is *in pari materiâ* with this one.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows :—

Six Manipuris and one Goorkha have been convicted by

(1) I. L. R., 11 Mad., 98.
(2) 11 C. L. R., 25.
(3) 17 W. R. Cr., 51.
(4) I. L. R., 16 Mad., 105.

the Officiating Sessions Judge of Cachar under section 396, Indian Penal Code, of having jointly committed dacoity in which three persons were murdered. The assessors were for the acquittal of all the prisoners disbelieving the evidence of the approvers Mukhta Singh and Mohan Singh.

On the night of Tuesday, the 11th of April last, the house of Mr. Cockburn, a tea planter of Balladhun, was attacked by a body of men, who first of all killed the chowkidar who was sleeping in the verandah, then killed Cockburn, and afterwards pursued the cooly woman with whom he was cohabiting and mortally wounded her in an adjoining jungle so as to cause her death a few days afterwards, and finally they carried off a large sum of money and various articles from the house. About these facts there can be no reasonable doubt. On the 13th of April the depositions of certain witnesses produced before him by the police were recorded by Mr. Howell, a Magistrate, at the place of investigation, and on the following day he recorded the dying declaration of the woman Sadi, who died soon afterwards. On the 8th of May the police enquiry was taken up by Jay Chunder Bhadra, Inspector of Police of Sylhet, who was specially deputed for that purpose. The proceeding commenced before the Magistrate at Silchar on the 3rd of August, and the prisoners were committed for trial by the Sessions Court on the 7th of August.

Four of the prisoners, Sagal Samba Sajao, Chouba Singh, daffadar, Nasiba Nengthonba and Madan Hijapa, as having taken a prominent part in the offence, have been sentenced to death, and the other three, Chaubangbang Sajao, Amur Feberi and Sarba Singh, have been sentenced to transportation for life. The case is before us on the appeal of all these persons and also on reference made by the Sessions Judge for confirmation of the sentences of death. The offence is one of the most atrocious character, the attack by a body of men having taken place about midnight for the purpose of robbing a European tea planter of money which had recently come into his possession, and all those in the house, the tea planter, his native woman and his chowkidar, were killed by sharp-cutting instruments, probably *daos*, in that attack.

The hearing before us has occupied several days, and we have the satisfaction of feeling that everything that could be said in

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

the case has been said before us by Mr. Woodroffe who appeared for the appellants, and by Mr. Hill for the Government in support of the convictions. The case for the prosecution depends entirely on the evidence of two approvers, Mukhta and Mohan, and it becomes our duty to determine how far they can be believed and how far their evidence is corroborated. It is much to be regretted that the difficulties in this case have been increased by serious irregularities in the proceedings in every stage of it before the Police, before two Magistrates, who at various times interposed during the Police investigation, before the committing Magistrate, and at the trial in the Sessions Court.

Madhab Baori, the bearer of the tea planter, was the first to give the alarm. He went early in the morning of the 12th of April, as usual, to attend to his master and found the body of the master lying at the entrance of the house from the western verandah. A milkman arrived about this time who has not been examined. The bearer at once went towards the cooly lines and met Bepin Behari Baori, the garden clerk, and Chunder Coomar Shome, the garden doctor, who were going towards Cockburn's bungalow, because it had been arranged that the coolies were to be paid and Cockburn had not appeared. They went with the bearer to the bungalow, saw Cockburn's dead body as already described, then found the chowkidar's dead body covered by a blanket in a corner of the verandah, and lastly found the woman Sadi mortally wounded in an adjoining piece of jungle. She was removed to the cookhouse and attended to. On information given, Dr. Dundee and Mr. Murray, a tea planter, arrived. The safe in the bungalow was found to have been broken open, and its contents, a large sum of money, gone, and other articles were missing. Blood was also seen on one side of the mosquito curtain of the bed on which Cockburn had been sleeping. The local Police arrived soon after.

It is not quite clear, but it would seem that in the first instance it was suspected that some Cacharis had committed the offence, and that it was not until long after, probably not until the Sylhet Inspector had taken up the case, that Manipuris were proceeded against. The woman Sadi in her dying declaration made to Mr. Howell, Assistant Commissioner and Magistrate, on the 14th of

April, stated that "they were Manipuris who attacked the bungalow, and a Kabuli, some of the Mussulmans not belonging to the bungalow cut him, that is the Sahib, down. I saw twelve or thirteen men. There were Cacharis among them too. I could identify them on seeing them. I do not know the names of any. (She then described the clothes worn by the Kabuli). There were no Manipuris, Kookies or Nagas among them that I saw." We may here state in passing that in the Sessions Court objection on behalf of the prosecution was allowed to the reception of this statement as evidence, and that although an application was immediately made on behalf of the defence to summon the Magistrate who had recorded it so as to make it evidence, the Sessions Judge at first abstained from passing orders on this application and eventually refused it. The Sessions Judge, however, has himself considered and discussed the contents of the statement without laying it before the assessors who with him formed the Sessions Court, and he has dismissed it as unreliable. As it is undesirable to interrupt the narrative of the evidence it is sufficient here to say that this was a material piece of evidence to which the defence was entitled, and which it was the duty of the prosecutor in the Sessions Court properly to place before the Court at the trial, and that it has not been properly considered by the Sessions Court. In taking objection to the admission of this statement, without doing his utmost to cure any technical defect, the public prosecutor has in our opinion failed in his duty, and we would direct his attention to the remarks of Wilson, J., in *Empress* v. *Dhunno Kazi* (1), in respect of his duties. Mr. Hill who appears for the prosecution in this Court very properly makes no objection to the statement being laid before us. We may further state that we cannot in any way concur in the reasons given by the Sessions Judge for holding that, if received, that statement is useless because it is incoherent, and on the face of it unreliable. The statements made by the bearer and others who spoke to Sadi do not show that she ever gave a contrary account of this matter. It is however material only to show how the case was started, and the impression made on the mind of the woman regarding the class of persons who attacked the bungalow.

(1) I. L. R., 8 Calc., 121.

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

The Sylhet Inspector took up the case on the 8th of May, but he did not send it up to the Magistrate until the 3rd of August. Meantime many persons, including the prisoners now before us, and the two approvers, were arrested, and many of these persons remained in police custody under special orders obtained from time to time from the District Magistrate for terms exceeding in some instances as much as one month. This will be again referred to.

The Inspector has stated that Sagal Samba Sajao, one of those now under trial, was arrested on the 28th or 29th of June. What is described as his confession was recorded on the 3rd of July by Mr. Lees, Assistant Commissioner and Magistrate, at Balladhun, and Mr. Lees has stated that he went to Balladhun expressly for that purpose. No reason has been given why this man was not sent on to Silchar within 24 hours of his arrest as usual, and according to law, or why that statement should not have been made to a Magistrate at Silchar instead of to a Magistrate brought to Balladhun to take it while he remained in police custody. We may add that no reason is given for his being kept for another month in police custody except that one of the applications, dated the 11th of July, for a special order from the Magistrate for detention for a term of ten days is made for "the completion of investigation." In none of the orders passed by the District Magistrate is any special reason given for sanction to the detention of this man, although the law, section 167, Code of Criminal Procedure, expressly requires this to be done. In the case of others, and notably the cases of the approvers, a similar course was taken, and similar irregularities are to be found, except that in the application made on the 7th of July by the police in respect of sanction to the detention of Mukhta Singh, one of the approvers, and others, the reason stated is that "they are men of Manipur, have no houses here, and there is every likelihood of their absconding from here." If any detention was under such circumstances necessary it should certainly not have been in police custody but in the Magistrate's lock-up. The Magistrate, however, sanctioned a detention for ten days without comment, and he extended that detention on similar applications, which expressed no reason at all for making them. We shall refer to this matter again. We mention it now to show

how little confidence can be given to the statements made by Sagal Samba Sajao and the approvers, which have been obtained under such circumstances. It is also deserving of mention here that on the 5th of August, that is on the day after Mohun Singh had given his evidence on conditional pardon, it is recorded that Sagal Samba Sajao, prisoner, says (voluntarily) "I was told by the Inspector that if I told the truth before the Magistrate I should be released, but I have been kept in *hajut*." From this we understand that he desired to intimate to the Magistrate that his statement had been made under promise of pardon which had not been kept, and that he desired to protest against the preference shown to Mukhta and Mohan. This matter is deserving of consideration as there are complaints of pressure and misconduct by the police, to which the unusually prolonged detentions in their custody under authority of orders of a Magistrate very improperly and illegally passed, give weight. The record next shows that on the 1st of August Mukhta and Mohan Singh were examined at the Police Thanah on solemn affirmation by Mr. Lees. The Sylhet Inspector has stated that he cannot say on what day he first examined Mukhta Singh, and he declines to refresh his memory by referring to his diaries on the point. It is a matter of much regret that the Sessions Judge should not have insisted on full information of this. The examinations taken by Mr. Lees on the 1st of August were as incriminatory as the statements made by them as approvers. Consequently, if any statements were taken from them, they should not have been examined as witnesses but as persons confessing their participation in an offence then under police investigation. These men, moreover, had for some time previously been in police custody and were still under detention. Lastly, there is nothing on the record to show why these men should have been so examined on the 1st of August by Mr. Lees, a Magistrate not competent to deal with the case itself when the police investigation was practically completed, for the entire case was brought before the District Magistrate at Silchar on the 3rd of August.

The District Magistrate commenced his proceedings by examining Sagal Samba Sajao and the other accused, but he did not examine Mukhta Singh and Mohan Singh. The statement of Sagal Samba Sajao was really a cross-examination as to the

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

statement recorded by Mr. Lees on the 3rd of July apparently to cure any irregularities in recording that statement, and to elicit the names of others which had not been mentioned. Mr. Woodroffe, for the appellants, very properly protested against the enquiry before the committing Magistrate being opened in this manner. If any of the accused desired to make a statement, the Magistrate was competent to record it, but he clearly went beyond the law in proceeding as he did. The law merely empowered the Magistrate to put such questions to any of the accused as he might consider necessary to enable such person to explain any circumstances appearing in evidence against him. We may add that it certainly did not warrant the course taken in respect of Sagal Samba Sajao. The pleader who defended these persons appears to have unsuccessfully objected to this procedure An application was at the same time made on their behalf that they should be given an opportunity to instruct and consult their pleader. This also was refused, and we may here state that the prisoners were committed to the Sessions Court on evidence recorded on examination in chief and without any cross-examination being allowed. Mr. Hill has told us that this practice is not unusual, but it is one that has never yet come under the notice of either of us. The unfairness of such a course is so obvious that we cannot understand how it could be adopted or defended. The Magistrate then examined Mr. Murray and Dr. Dundee, and after tendering a conditional pardon to Mukhta, which was accepted, he examined that person also as a witness. On the same day the Magistrate offered a conditional pardon to Mohan Singh, but it was not accepted until the next day, when he also was examined as a witness. Bepin, the garden clerk, was also examined on the 4th of August. On the 5th, 7th, and 8th other witnesses were examined. A charge was drawn up on the 8th, and on the 9th of August the prisoners were committed to the Sessions Court for trial.

When the trial commenced the public prosecutor, as already stated, informed the Court that he did not intend to put in the dying declaration of the woman Sadi as recorded by the Assistant Magistrate Mr. Howell. It was on the Magistrate's record, but it was contended that it had not been attached thereto until after commitment. We are surprised that such an objection

could have been taken by any one representing Government as a public prosecutor. Objections were also taken to the form and character of the document. This has already been noticed.

Objection was next taken by the pleader for the defence to the commitment as invalid in law, and this was overruled by the Sessions Judge. In this respect it is sufficient to say that, however much we may regret the irregularities in the Magistrate's Court which have already been described, we are not disposed to disagree with the order of the Sessions Judge who overruled them as the case had come on for trial.

It now becomes our duty to describe and consider the evidence on which the Sessions Judge, differing from the assessors, has convicted all the accused.

The case for the prosecution is that the delay on the part of the planter Cockburn in paying the prisoners' money due to them for work connected with some houses, and the recent receipt of money by Cockburn, suggested to the prisoners the idea of looting the bungalow so as to obtain what was due to them, and that from being employed on the premises they knew that this money had recently been received by Cockburn. There is, however, an entire absence of proof that any money was due to these men. The statements of the approvers, Mukhta and Mohan, are not clear on this point.

The evidence of these approvers, on which the convictions entirely depend, has, as already stated, been obtained under circumstances of much irregularity tending to throw great suspicion on it. The assessors, we observe, disbelived that evidence, holding that the approvers had been tutored, and one assessor has further stated that he noted that, when being examined for the prosecution, the approvers answered readily, but when cross-examined they had to think. The statements themselves are clearly not candid nor full. Neither of the approvers admits that he took any prominent part in the attack or plunder. They describe themselves as having accompanied the men who really committed the offence charged, and to have remained on guard so as to give warning of the approach of any interruption to the attack on the bungalow, and generally to have been at most spectators of what others did. They do not even describe what they say they

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

saw correctly, for they both state that the chowkidar was cut down by two of the prisoners, whereas his body shows only one wound on the head, and as the medical evidence describes that wound it is impossible that two cuts should have been delivered on the same part of the head. One cut must have felled the chowkidar so as to make it impossible that a second cut should have been delivered on the same spot, so as to give the appearance of one wound. Mukhta alone describes how Cockburn was cut down. Then they both say that the money was taken out of the safe in a bag, but the garden clerk has stated that the money was kept in the safe and inside a wooden box and a broken wooden box was found on the premises, but neither of the approvers mentions any box. They also say that afterwards they stopped below the Haibang tree, and that they each received Rs. 10, and left. Whether the others, except Amoo, received anything they cannot say, and it does not appear that there was any further distribution, though there was ample opportunity for this. So far, therefore, the statements of the approvers are very unsatisfactory. They do not fully describe what took place, and in some respects their statements are contradicted on very material points.

In the next place there is absolutely no real corroboration. There is some evidence that some of the prisoners were seen together in consultation before the offence, and also that some were seen together shortly afterwards. As to the first we think that such evidence is of very little importance even if it be believed. The men are all Manipuris, and their being together may have been for a lawful and proper purpose. As to the second we think that the evidence is altogether unreliable. It was obtained, the Inspector admits, long after the commission of the offence, and it is impossible to believe that the witness Babu Singh should have recollected it as an extraordinary and unusual circumstance, seeing these prisoners going along on this particular night on which in consequence of a festival every one was moving about and keeping late hours. Then there is some evidence that shortly after the offence one of the prisoners was possessed of money and lent it on a bond. But there is nothing reliable to show that he was not honestly possessed of this money. That he had money before the commission of the offence now under trial is proved by one of the bonds on the

record by which he on a previous date lent money. There is, therefore, not only an absence of all corroboration of the statements of the approvers, but those statements are in themselves very unsatisfactory, and in some respects opposed to facts about which there can be no doubt. The assessors have disbelieved the evidence of the approvers, because it has the appearance of being tutored. The statements were, as already mentioned, first obtained after a detention in police custody for nearly one month, if not longer. They were recorded after such detention, not by the committing Magistrate, but by a Magistrate of inferior grade and while these men were still in police custody. They were recorded as made by these men as witnesses under solemn affirmation, and consequently without a certificate, such as would have been made by the Magistrate if they had been properly recorded, that the statements were voluntarily made. The Sessions Judge, however, accepts the evidence of the approvers as reliable, because the story told is "a long and detailed one," because it would be difficult to tutor these men who knew no Bengali, because they were kept apart, and because he does not consider that the Inspector was capable of such misconduct. The Sessions Judge, however, has overlooked the length of time that these men were in police custody before they made any statement to a Magistrate or the details of those statements on points on which they might have been corroborated, and were contradicted, apart from the long detention in police custody. We have no hesitation in agreeing with the assessors that the evidence of the approvers is not reliable. That long detention seems to us unmistakeably to show that those statements were obtained under pressure by the police.

In regard to Sagal Samba Sajao we think that he cannot properly be convicted on his own statements. His first statement to Mr. Lees, which was made in Manipuri, was obtained through an interpreter, who translated it into Bengali, and thence it was retranslated and recorded by the Magistrate in English. It was also recorded in Manipuri. That record, however, is very different from the English record. The Manipuri document must be regarded as the proper record and the only evidence in this case, and on that he cannot be convicted. It is not improbable that he may have made

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

the statement as recorded by Mr. Lees in English. But even on that statement he cannot properly be convicted. There are, however, serious objections to accepting that statement apart from the objections to its being inadmissible as contradicted by the Manipuri document. Moreover, the manner in which that statement was obtained after several days of police custody, and at the police station, would raise serious doubts in our minds whether it was really voluntarily made. The statements obtained by the Magistrate on the 3rd of August, by what cannot be regarded except as a cross-examination of the prisoner, so as to substantiate and supplement the statement recorded by Mr. Lees in English, are also open to serious objection. In addition to what has already been said on this subject we think that there is every reason to believe that the statements were made in consequence of inducements or promises within the terms of section 24 of the Evidence Act. For all these reasons we cannot convict Sagal Samba Sajao on his own statements. We may add that if the Manipuri statement, which in our opinion is the proper record, had not been made, the Magistrate would not have strictly complied with the spirit and intention of section 364 of the Code of Criminal Procedure in recording that statement in English. The statement was made in Manipuri, and communicated in Bengali to the Magistrate through a sworn interpreter, and again translated by the Magistrate into English and so recorded. The law requires that ordinarily such a statement should be recorded in the language of the person making it, the object being to represent the very words and expressions used so as to ensure accuracy, and prevent misrepresentation or misconstruction of what was said. If such a record is not practicable the law directs that the statement shall be recorded in the language of the Court or in English. If, however, as in this case, a second translation be made, and the statement be recorded as so understood, the accuracy which the law contemplates is made more remote. This we may observe was done in the present case without any reason, since there must have been ample means at hand to render into Bengali the statement as recorded by the Inspector from the prisoner's words in Manipuri. We must not be understood to hold in this case that if the Manipuri document had not existed we should have held the English record to be inadmissible as evidence. We would merely caution the Magis-

trate against a repetition of such procedure as tending unnecessarily to affect the weight which might be attached to the accuracy of a statement so recorded.

Reference has already been made to the circumstances under which the statement of Sagal Samba Sajao was recorded by Mr. Lees on 3rd July. He had at that time been in police custody since the 28th or 29th of June. We can find no reason on the record why he was so detained by the police beyond the term allowed by section 167 of the Code of Criminal Procedure. Mr. Lees has stated that he went to the place of investigation for the express purpose of recording that statement, so that it must have been known that the prisoner was inclined to make some statement. If such intimation could be made to the Magistrate so as to bring him to the spot there was ample time to send him on to the Magistrate. This is the course usually taken, and it should, in the present instance, have been specially observed, seeing that the man had already been for several days in police custody. The statement was recorded at the police station, but we do not find that beyond this, and the prolonged and illegal detention in police custody, and the conclusions necessarily arising from these circumstances, and the objectionable course taken in sending for a Magistrate instead of sending the prisoner to a Magistrate, there was any reason to suppose that the statement when made, whatever it was, was not properly made. Still in drawing attention to all these points we must strongly condemn the proceedings taken. Others were similarly detained in police custody for a very long term, but under authority of various orders of the District Magistrate improperly given and without any regard to the law which requires that before detention in police custody is sanctioned special reasons should be recorded by the Magistrate. Not only were no special reasons recorded, but so far as the record shows none could have been assigned. We observe too that in one instance the police asked for permission for a further detention of some men for eight days, and the Magistrate sanctioned a detention of ten days. It is, we trust, sufficient to mention these facts, for no doubt they will receive proper notice from the local Government.

The refusal of the District Magistrate to allow the prisoner, when brought before him, to communicate with their pleader so as

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

to properly instruct him as to their defence was also most arbitrary and improper, and his refusal to allow any cross-examination during the judicial inquiry in his Court before commitment is open to the same condemnation.

Mr. Hill for the prosecution, without attempting to support the refusal to cross-examine, has endeavoured to show that the Magistrate may have been misled by the terms of the Code of 1882, when contrasted with those of the Codes of 1861 and 1872. Mr. Hill pointed out that, although the Evidence Act, 1872, provides for cross-examination after an examination-in-chief, the Code of 1872 passed simultaneously expressly allowed cross-examination by the accused during an enquiry previous to commitment, but that the Code of 1882 omitted this, and that thus the Legislature has given some reason for believing that it was intended to deprive an accused of such a right before commitment. Mr. Hill has also drawn our attention to the terms of section 210 of the Code of 1882, which directs a Magistrate to frame a charge if, upon taking the evidence for the prosecution and such examination of the accused as may be thought necessary, he finds that there are sufficient grounds for committing the accused for trial, and that section 256 of the Code of 1882 gives an accused, in a warrant case, the right to recall and cross examine a witness for a prosecution only after a charge has been drawn. Mr. Hill, therefore, contends that the Magistrate may not unreasonably have understood the Legislature to have intended to restrict the right of cross-examination by an accused until after a charge has been drawn, or until it has been found that *primâ facie* an offence has been proved against the accused. We cannot, however, accept this view of the law or agree in holding that it is in accordance with our experience of the practice of Magistrates or reasonable. If the law (section 342) allows a Magistrate to examine an accused in the course of an inquiry or trial so as to enable him to explain any circumstances appearing in evidence before him before a charge has been drawn, surely he has a right by cross-examination to show that those circumstances have been improperly made to appear in the evidence given. The express provision made in the Code of 1872 for a cross-examination in any enquiry and its subsequent repeal, in our opinion, are of little significance, seeing that the Evidence Act provides for a cross-

examination as part of the record of evidence taken in a judicial proceeding. The fact that the Code of 1872 and the Evidence Act of the same year both simultaneously expressed the same thing was no doubt considered by the Legislature in revising the Code as a redundancy. The reference made by Mr. Hill to section 256 as to cross-examination after charge has been drawn in a warrant case does not really affect this point, for it does not prohibit cross-examination before a charge. As we understand the law it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time subject to a discretion given to the Magistrate by section 257. We are surprised to find that in this case the Magistrate should have deprived the accused of a right which is in accordance with elementary principles of judicial procedure. It should have been allowed if only to avoid any appearance of unfairness in his proceedings. The prejudice to the accused has, in this case, been aggravated by the fact that the Sessions Judge has under section 288 thought proper to treat the evidence so taken by the Magistrate without cross-examination as evidence on the trial, because some of the witnesses have in his opinion made contradictory or inconsistent statements to him. We do not at present refer further to this matter because we are now pointing out irregularities only in the Magistrate's proceedings.

The proceedings of the Magistrate in respect of the witness Jamra Singh also appear to us to be arbitrary and illegal. Because this witness did not depose, as the Police Inspector said he had spoken to him he was declared to be a hostile witness, and was cross-examined by the Inspector for the prosecution, and finally he was ordered to give Rs. 200 bail to appear when called for. This witness too, like the other witnesses examined by the Magistrate, was not tendered for cross-examination by the accused during the enquiry.

The Magistrate too readily accepted the statement of the Police Inspector on this point, and before he allowed this witness to be treated as a hostile witness he should have had something substantial to contradict him. The Magistrate's order regarding bail

1893

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO.

for this witness to appear when called for is, in our opinion, unauthorised by law. It does not appear that the witness himself was in any way disinclined to appear when called for by the Magistrate and, therefore, an ordinary recognizance should have been sufficient. We observe too that the consequence of this order has been that the witness has remained in confinement for more than a month and a half, that is until the Sessions trial. We are compelled, therefore, to come to the conclusion that the proceedings of the Magistrate have very materially prejudiced the accused.

In the Sessions trial too the prisoners have much reason to complain. They were suddenly deprived of the benefit of the dying declaration made by the woman and recorded by Mr. Howell, and when they asked to have the evidence of Mr. Howell taken to make that statement admissible as evidence, the Sessions Judge abstained from issuing process so as to obtain the attendance of Mr. Howell, and finally he refused to do so for reasons which are altogether untenable. He then proceeded himself to consider Sadi's dying declaration, and rejected it as unreliable, forgetting that the assessors with him formed the Sessions Court, and that they equally with him were entitled to express an opinion on the weight to be given to any matter in the case affecting the result.

As to the witness Sajao Singh the procedure of the Sessions Judge is also open to objection. Before the Magistrate this witness stated that two of the prisoners left his house at about 10 A.M. Before the Sessions Court he said that they remained all night. He accounted for this contradiction as being due to a mistake. This contradiction was not itself sufficient ground for treating this witness as a hostile witness. The Sessions Judge, however, allowed the prosecution to cross-examine him because, "I find on enquiry from the prosecution *that they believe that they can prove facts which tend to show that the witness has probably been got up*, apart from the difference in his evidence." (The italics are those of the Sessions Judge). The prosecution have not attempted to do this, and to act on such a ground was clearly improper.

The deposition of this witness to the Magistrate, as well as

those of other witnesses given before the Magistrate, were under section 288, treated as evidence at the Sessions trial. We have already stated that, as those depositions were without any cross-examination by the accused, they should not have been so admitted in evidence. They were incomplete as they were without any cross-examination, inasmuch as the accused had not been allowed to cross-examine the witnesses. Section 288 permits a Sessions Judge to act in this manner if the evidence of a witness has been "duly taken." The evidence of these witnesses, in our opinion, was *not duly taken* since the accused had not been allowed to cross-examine them. Section 288 requires that the evidence must have been "duly taken" in the presence of the accused before the committing Magistrate. To require the presence of the accused merely to hear the *ex parte* statements of a witness without allowing him to show by cross-examination that the statements are untrue or unreliable defeats the real object of the law, for it deprives the accused of any substantial benefit from being present. In the course of the Sessions trial serious charges of misconduct were made against Khedan Singh and one Gossain, who apparently were employed by the Inspector Bhoirub Chunder Deb during the police investigation. Khedan was also employed as an interpreter to the Magistrates Mr. Howell and Mr. Lees. It appears to us that these charges have not received sufficient attention. How far after this interval of time they can be substantiated (supposing that they are true) may be doubtful, but that they should be made the subject of proper enquiry is very necessary.

We much regret to find such numerous and serious irregularities in the course of the proceedings before and during this trial, all of which must have seriously prejudiced the prisoner. On the evidence too we think that none of the prisoners can properly be convicted. The convictions depend entirely on the weight to be given to the evidence of the approvers, and we have no hesitation in agreeing with the assessors that that evidence is altogether unreliable.

All the prisoners are accordingly acquitted.

J. V. W. *Convictions quashed.*

PRIVY COUNCIL.

P. C.*
1893
Nov. 9, 10, & 11.

ABDUL RAZAK (PLAINTIFF) *v.* AGA MAHOMED JAFFER BINDANIM (DEFENDANT.)

[On appeal from the Court of the Recorder of Rangoon.]

Mahomedan law—Acknowledgment—Illegitimacy of birth—Insufficiency of father's acknowledgment without intention to legitimate.

On the question of the legitimacy of a son born to a Mahomedan by a Burmese woman, the question did not arise on this appeal whether the father could have entered into a valid marriage with the mother without her having relinquished Buddhism. The Court below found against her alleged conversion to the Mahomedan religion: and also found upon the facts that no marriage of the parents as distinguished from concubinage has taken place. The latter finding was affirmed.

As to the question whether the son born to them had been legitimated by the father's acknowledgment of him, it was *held*, that, under the Mahomedan law, the legitimation of a son, born out of legal wedlock, may be effected by the force of his father's acknowledgment of his being of legitimate birth; but that a mere recognition of sonship is insufficient to effect it. Acknowledgment in the sense meant by that law is required, *viz.*, of antecedent right, and not a mere recognition of paternity.

Ashruff-ood-dowla Ahmed Hossein v. *Hyder Hossein Khan* (1) referred to and followed.

APPEAL from a decree (5th February 1892) of the Recorder of Rangoon.

This suit was brought on the 30th March 1891 by the appellant against the executor of the will of a Shia Mahomedan, Hadji Husain Bindanim, formerly a merchant in Rangoon, who died on the 28th February 1890, leaving only a widow, Kulsam Bibi. The plaintiff claimed as a sharer to inherit his part of so much of the testator's estate as must devolve upon his family under the Imamia law. The title alleged was that the plaintiff was the legitimate son of a brother of the deceased Hadji Husain, named Abdul Hadi, who lived for some years in Burma, from 1854 onwards, and afterwards in Calcutta, where he died in 1886. Abdul Hadi, when in Burma, cohabited with a Burmese woman,

* *Present*: LORDS HOBHOUSE, MACNAGHTEN, and MORRIS, and SIR R. COUCH.

(1) 11 Moo., I. A., 94.

Mah Thai, by whom he had a son, the plaintiff, called at one time Moung Hpay, and at another time, and in these proceedings, Abdul Razak. This son, suing his uncle's executor, alleged that his father married his mother in 1854, and joining Kulsam as a co-defendant made title to all the estate that was not subject to his uncle's bequests, and to Kulsam's right to share as widow. On her own application on the 18th August 1891, she was made a co-plaintiff instead of a co-defendant. The executor, now respondent, claiming to be entitled (along with his brothers and sisters) to succeed to Hadji Husain's estate, asserted, in his written statement, as to his information and belief that Abdul Hadi died childless; and he put the plaintiff to proof of his being the legitimate son of his alleged father. Two principal questions were raised in the suit. First, whether Abdul Razak was born of a legal marriage; secondly, whether, if the marriage was doubtful, in fact, or in law, Abdul Hadi had, expressly or impliedly, acknowledged him to be his son, and what was the legal effect of such an acknowledgment by a father.

On this appeal, what might have been the legal result of an actual marriage ceremony in due form, followed by co-habitation, between Abdul Hadi and a Buddhist wife, was a question that was not raised. At the hearing the marriage was not proved; and the main question, on this appeal, was whether there had, or had not been, an acknowledgment by the father of his originally illegitimate son, sufficient and effectual to establish him in the status of a legitimate one.

The Recorder gave his reasons for dismissing the suit as follows. Part of his judgment, which is quoted by their Lordships, is here omitted; as also the evidence which they have set forth :—

"The issue I have now to decide is whether the plaintiff Abdul Razak is the legitimate son of Abdul Hadi. Assuming that Mah Thai did live with Abdul Hadi for about two years, that she became pregnant and returned to her parent's house at Mangi where the plaintiff was born, the evidence shows that the plaintiff was never circumcised, that he received a Burmese name and was brought up as a Burman.

"The first point to consider is whether there was a marriage between Mah Thai and Abdul Hadi. It is not disputed that before there can be a valid marriage between a Mahomedan and a woman who is not a

1893

ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM.

Kitabi, the woman must be converted to Mahomedanism. (See Tagore Lect., 1873, p. 305.)

Mah Thai's evidence as to the marriage was given in the judgment, which afterwards proceeded thus :—

"I think then that the plaintiff Abdul Razak has not succeeded in proving that his mother Mah Thai was converted to the Mahomedan religion at the time of the alleged marriage, and that as she was not a *Kitabi*, no valid marriage could have taken place between her and Abdul Hadi ; not only this but Mah Thai, admittedly, had before going to live with Abdul Hadi been married according to Burmese law, and the evidence that she was ever divorced rests only on her unsupported statement. However, I do not lay much stress upon this, but go on this ground that, assuming for the sake of argument that Mah Thai did live with Abdul Hadi at the time she says she did, and that the plaintiff is her son by Abdul Hadi, yet, not having been converted to Mahomedanism, she could not have been legally married to Abdul Hadi. If I am right in this view, then it follows according to the decision of the Allahabad High Court in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1) that no acknowledgment on the part of the father could legitimatize the offspring of such an union. Mahmood, J., points out that, according to Mahomedan law, so far as inheritance from males, or through males, is concerned, the existence of legitimacy of descent, or consanguinity, is a condition precedent to the right of inheritance, and that such legitimacy depends upon a valid marriage, or connection, between the parents of the inheritor. Further that in no case can an illegitimate child inherit ; and that where a marriage is not possible between the parents, acknowledgment cannot make the offspring of the union legitimate. He also points out that the Mahomedan law of acknowledgment of parentage with its legitimating effect has no reference whatever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible, as in my opinion is the case here, or, by reason of marriage necessary to render the child legitimate being disproved. Further, that the doctrine relates only to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved, in the sense of the law, as distinguished from disproved ; in other words, that the doctrine only applies to cases of uncertainty as to legitimacy, when acknowledgment has its effect, but that that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

"This view, if I may say so, appears to me to be clearly right. Otherwise, if the proposition that acknowledgment alone is sufficient to establish legitimacy is correct, these results must necessarily follow, that a Mahomedan may legitimatize the offspring of adulterous or incestuous intercourse, or even a person of whom he could not possibly have been the father, for example to put an extreme case, a person older than himself. And this result would

(1) I. L. R., 10 All., 289.

also follow in the present case. The parents of the plaintiff Abdul Razak could not, according to Mahomedan law, contract a legal marriage; the offspring of their intercourse must therefore be illegitimate: but Abdul Hadi acknowledged the child; therefore he is legitimate.

"In the view, then, that I take of the case, it is unnecessary to consider the evidence as to the acknowledgment and as to the will, for assuming the whole of it to be true, the plaintiff, Abdul Razak, cannot be the legitimate son of Abdul Hadi. So far as he is concerned, the suit must be dismissed with costs, including the costs of the Commission."

The *Solicitor General* (Sir *J. Rigby, Q. C.*) and Mr. *R. V. Doyne*, for the appellant.—The judgment below was that the parents could not have contracted a legal marriage, without the conversion of the woman, which had not taken place, and that consequently there could be no legitimation of the child by the father's acknowledgment. This rested on the finding that there had been no conversion; and on the impossibility of there being legal intermarriage between a Mahomedan and a Buddhist. The question, however, whether the plaintiff had been legitimated by his father's acknowledgment should not have been held to be concluded by the supposed impossibility of the marriage. The latter ground of decision was erroneous, for, assuming that the woman, Mah Thai, was considered, in regard to the Mahomedan Law of Marriage, an idolator, the effect of the prohibition to marry an idolator had been removed by her sufficient conversion. If her conversion had taken place, or if her marriage without it would have been possible, then it followed that the legitimacy of the appellant should have been held to be established by the acknowledgment of paternity on the part of Abdul Hadi. The Recorder had not rejected as altogether false the evidence of the proceedings that preceded the co-habitation, but he found the genuine conversion of Mah Thai not to have been proved. It was submitted that he erred on the latter point. If her conversion was essential, then there was sufficient evidence of it, when it was proved that she had professed to conform to the religion of her husband. Also it was open to contention that there was no distinct authority against the legality of a Mahomedan's marriage with a Buddhist. His marrying a polytheist, or idolator, was prohibited, but with regard to the Buddhist system it was not certain that the prohibition would have included a Burmese woman. The exception of the

1893

ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM.

Kitabi, and the permission of marriages with Jewish, or Christian women, were referred to. The argument was that there might have been a legal marriage, and that the possibility of there having been one in 1854, favoured by the presumptions directed to the support of the fact of marriage, formed a ground upon which the father's declaration of his paternity and treatment of the appellant as his son would have effected his legitimation. Such a legitimation had taken place by and through presumption of marriage, antecedent to birth, that presumption following open recognition of sonship. As to the prohibition of the marriage of Mahomedans with polytheists, Baillie's Digest of Mahomedan Law, Hanifia, Part I, Book I, Chap. III, p. 40, second edition, and Imamia, Part II, Book I, Chap. I, section 3, p. 29; Macnaghten's Mahomedan Law, Chap. VII, section 12; Hamilton's Hedaya, Vol. II, Book VII, Chap. III, were referred to.

As to legitimation by a parent's declaration, reference was made to Baillie's Digest of Mahomedan Law, Hanifia, Book V, "of parentage;" Chaps. I and II, "of acknowledgement;" Imamia, Book VII, Chap. III; Macnaghten's Mahomedan Law, Chap. VII, section 33; Precedents, Chap. VI, case 46; Hamilton's Hedaya, Vol. III, p. 168. It was contended that acknowledgment of sonship, assisted by a presumption in favor of the marriage of the parents having taken place on the part of the father, had effected the legitimation of the appellant enabling him to inherit. The legitimation was considered as effected through the presumption of marriage strong in the Mahomedan law, and the legitimation was not dependent on the father's adding, or not adding, a declaration of legitimate birth. The acknowledgment involved the son's legitimacy in consequence of the presumption of marriage where a marriage would have been legal, and where the circumstances did not negative its having taken place. The son might possibly have been born in wedlock. That was enough for the operation of the father's acknowledgment. Reference was made to *Mirza Qaim Ali Beg* v. *Hingun* (1). In *Hidayut-oolah* v. *Rai Jan Khanum* (2), continued cohabitation and acknowledgment of parentage were held to be presumptive evidence of marriage and legitimacy. In *Mahomed Bauker Hossein* v. *Shurfoonissa*

(1) 3 Sel. Rep., 152, 154. (2) 3 Moo., I. A., 295.

Begum (1), it was held that the legitimacy of the child might be inferred, or presumed, from circumstances without any direct proof either of a marriage between the parents, or of any formal act of legitimation. In the judgment in *Ashruff-ood-dowla Ahmed Hossein* v. *Hyder Hossein Khan* (2), it was said that a child born out of wedlock was illegitimate, but, if acknowledged by the father, he acquired the status of legitimacy; and that such acknowledgment might be express or implied, directly proved, or presumed; and that these presumptions were inferences of fact. In *Khajooroonissa* v. *Roushan Jehan* (3) the statement of the law in *Hidayutoolah* v. *Rai Jan Khanum* (4) was referred to and applied. Reference was made to *In the Matter of the Petition of Najibunnissa* (5); *Mahammad Asmat Ali Khan* v. *Lalli Begum* (6); *Sadakat Hossein* v. *Mahomed Yusuf* (7); *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (8).

Mr. *J. D. Mayne* and Mr. *J. H. A. Branson* for the respondent.—There was no sufficient evidence of the marriage, or of acknowledgment of the appellant as his legitimate son. If the parents had gone through the ceremony of marriage, the wife being a Buddhist, it would not have been a legal marriage; and if the acknowledgment had been made by the father, as it was alleged to have been, it would not have been effectual to legitimate the appellant. The acknowledgment, in order to have that operation, must be made by the father with intent to confer the status of a legitimate son upon his son. Here it was not alleged that this had taken place with this intent. The acknowledgment of a father, where there was a doubt whether there had been a marriage or not, might operate to legitimate a son where there had been no such ceremony, but it must have been made with the above intent. So also of treatment of a son as legitimate. Again, there was a restriction upon the father's power of legitimating a son, which would have effectually prevented its exercise in this case; and that was that the marriage to be

(1) 8 Moo., I. A., 136. (2) 11 Moo., I. A., 94.
(3) I. L. R., 2 Calc., 184; L. R., 3 I. A., 291.
(4) 3 Moo., I. A., 295. (5) 4 B. L. R. A. C., 55.
(6) I. L. R., 8 Calc., 422; L. R., 9 I. A., 8.
(7) I. L. R., 10 Calc., 663; L. R., 11 I. A., 31.
(8) I. L. R., 10 All., 289.

1893

ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM.

presumed must have been one that could have taken place between the parents. Here, the marriage would have been illegal and void by Mahomedan law. The Recorder's opinion on this was right, as also was his finding against the conversion. However, the evidence not having gone further than to allege a recognition of the appellant's being an illegitimate son of his father, without any intimation that he was to be regarded as legitimate, the case failed in that way. This would have been insufficient to render the appellant capable of inheriting as if he had been of legitimate birth, and the suit was rightly dismissed.

Reference was made to Baillie's Digest of Mahomedan Law, Hanifia, Book V, "of parentage," Chapters I and II, "of acknowledgment;" Hamilton's Hedaya, Vol III, 549; Wilson's Glossary, "ikrar," 215; Macnaghten's Mahomedan Law, Chap. VII., Section 33, and Precedents, Chap. VI, and all the cases cited in the argument for the appellant were examined to show that intention in the acknowledgment was necessary to legitimation. An example of the insufficiency of random statements was in the case of *Mahomed Bauker Hossein* v. *Shurfoonissa* (1).

The *Solicitor General* in reply cited *Saiyad Wali Ulla* v. *Miran Saheb* (2) showing that the acknowledgment of a son as legitimate need not be a formal acknowledgment. If it could not be made out from the father's acts and conduct, that acknowledgment, however informal, would be sufficient to cause the presumption to take effect; that presumption being in favour of legitimate birth.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN.—Hadji Husain, who was a member of a Mahomedan family belonging to the Shia sect and settled in Calcutta, traded as a merchant in Rangoon, made a fortune, and died there, married but without issue, in February 1890. He left a will by which he purported to dispose of all his property. Hadji Husain had an only brother of the full blood called Abdul Hadi, who died before him in March 1886. He too was engaged in business in Rangoon for many years, but his career was less prosperous, and he returned to Calcutta a poor

(1) 8 Moo. I. A., 136. (2) 2 Bom., 285.

man some time before his death. The appellant claims to be the lawful son of Abdul Hadi by a Burmese woman, and as such to be the heir or one of the heirs of Hadji Husain and entitled therefore to a share, in so much of his estate as he could not dispose of by will according to Mahomedan law. For the purpose of the present case it is conceded that the appellant's claim is well founded, provided he can make out that he either is or is entitled to be treated as the lawful son of Abdul Hadi. And the only questions on this appeal are these: (1) Has it been established that a valid marriage took place between Abdul Hadi and the appellant's mother, Mah Thai, who was undoubtedly a Buddhist when she met her alleged husband? (2) If proof of legitimacy is wanting, is there sufficient evidence of the legitimation of the appellant by acknowledgment?

The learned Recorder found that there was no marriage, holding upon the evidence that Mah Thai was not a convert to Mahomedanism. "It would, it seems to me," he observed, "be a mere mockery of the Mahomedan religion to say that there was a conversion, when there was not even a semblance of discussion on the subject, when no priest intervened, and when the utmost the alleged convert can say is, that she repeated prayers in a language she did not understand." Taking this view he thought it unnecessary to consider the evidence as to acknowledgment. No acknowledgment in his opinion could confer the status of legitimacy upon the offspring of a Mahomedan and an unconverted Buddhist.

The learned Counsel for the appellant took exception to the proposition upon which the Recorder's ruling seems to be based. It was a mistake, they said, to talk of conversion. No Court can test or gauge the sincerity of religious belief. In all cases where, according to Mahomedan law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mahomedan faith. Profession with or without conversion is necessary and sufficient to remove the disability.

This criticism seems to be well founded. But the correction does not mend the appellant's case. There is nothing in the evidence tending to show that Mah Thai made any profession

1893

ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM.

of the Mahomedan faith before or at the time of the ceremony which is said to have constituted marriage. Mah Thai was a witness for the appellant. She said that she knew nothing about the Mahomedan religion; all her life she lived and worshipped as a Burmese. While cohabiting with Abdul Hadi she worshipped as he did; she repeated his prayers. But she added that she did not understand the meaning of a single word. In re-examination she said that she ceased to be a Buddhist during her cohabitation with Abdul Hadi from the time of her marriage.

The learned Counsel for the appellant then invited their Lordships to embark on a wider inquiry. They proposed to examine and discuss the tenets of Buddhism with the view of showing that Buddhists come under the same category as Jews and Christians, with whom undoubtedly Mahomedans may intermarry. But it was obviously impossible for their Lordships to entertain the question in the present case. In the Court below it was common ground that such a marriage would be invalid, and there was therefore no evidence before the Court directed to the point.

In the next place it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult, if not impossible, to obtain a trustworthy account of what really occurred. There would be much force in this argument—indeed it would be almost irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife. In cases like the present conduct is a very good test, and a safer guide perhaps than the recollection or imagination of interested or biased witnesses. Mah Thai's own account of the way in which she was treated may be accepted as a fairly truthful story, considering her relationship to the claimant, and the fact that she is speaking of what occurred many years ago. The alleged marriage took place somewhere about the year 1854. If that date is correct the connection between her and her alleged husband ceased in 1856, though Abdul Hadi did not leave Rangoon for good until more than twenty years afterwards. The marriage was proposed to her,

she says, by a married sister of hers who was living in Rangoon, and who sent for her from her native village—a place called Mangi about half a day's journey off. She had already been married once, but that marriage was dissolved by mutual consent. Abdul Hadi was brought for her to see. She asked him if he would look after her and cohabit with her for a long time and he said he would. He came four or five times before the marriage. He said he would invite his male relatives, but he was not going to invite his female relatives. At the marriage some money and a ring were put into her hands as dower; with that part of the ceremony she seems to have been previously acquainted and to have been careful to insist upon it; and her consent to the union appears to have been given in due form. Then we have a picture of her married life. After the marriage she was not allowed to go out. She never saw any of her husband's female relatives. She did not know why they did not come to see her. She was not allowed to go to the mosque. She knew that wives of Mahomedans go to the mosque. She did not go because Abdul Hadi would not allow her. None of the female members of the Mahomedan community visited her, nor did she visit them. She never saw Hadji Husain or any of Abdul Hadi's male relatives. At the end of about a year and a half, when she was far gone in pregnancy, she went back to her mother's home in Mangi. She was confined there of a boy, whom she identifies as the present appellant. When the child was born she sent a message to Abdul Hadi to tell him of the birth. His answer was that he was busy and could not come. He sent however money for expenses, and he sent a message to her parents to look after her. On two occasions afterwards he went to Mangi to visit her, returning to Rangoon in the evening. The first visit was about six months, the second about twelve months after the birth of the child. On the first occasion Mah Thai says she saw Abdul Hadi alone, but nothing in particular was said. He wrote on a piece of paper a Mahomedan name for the child. Afterwards for fear it would be lost it was copied on a palm leaf. The name was never used. The paper and the palm leaf have disappeared. But Mah Thai says the name was "Abdul Razak," and that name has been reproduced or adopted in connection with this claim. On the second occasion, accord-

1893

ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM.

ing to Mah Thai's statement, Abdul Hadi wanted to take the child to Rangoon, and wanted her to go with him. She said she was not well yet and that the child was not old enough. That was the last occasion on which Mah Thai saw Abdul Hadi. So far as appears she never even heard from him or of him afterwards. He was at that time apparently in prosperous circumstances, but he made no provision for her or for the child, and he left the child to be brought up as an unbeliever without so much as performing the primary rite of his religion. Mah Thai was very badly off, but she never applied to her alleged husband for assistance, nor did she make any attempt to see him, though she knew where he lived, and he had, she said, been kind to her while they cohabited together, and she liked her life with him. At the end of two years, or four years as she says in one place, she married a Burman by whom she had seven children. Then she was divorced and at the time of the trial she appeared as the wife or partner of a fourth consort.

Abdul Hadi continued to reside in Rangoon for a good many years, paying occasional visits to Calcutta. After a time he met with reverses and left Rangoon altogether. The last years of his life he spent at Calcutta, living as a pensioner on the bounty of his brother, Hadji Husain.

The child was brought up by Mah Thai's parents who were in humble circumstances. As "Moung Hpay," which was the name they gave him, he lived till he was about thirty-five, with no higher aims or aspiration than those of an ordinary Burmese peasant. When the heirs of Hadji Husain were wanted, he was discovered in the jungle at Mangi by some enterprising gentlemen at Calcutta who took the matter up as a speculation. They put him forward as the missing heir, and "Moung Hpay" has become an *alias* for "Abdul Razak." Their interest in the success of the claim is at least a guarantee that no stone has been left unturned to enable the case to be presented in as favourable an aspect as possible.

In the course of the argument Mr. Wheeler, the Judicial Clerk of the Privy Council, referred their Lordships to a case decided by the Special Court of British Burmah in 1875. It is to be found at page 75 of Mr. Christopher's Collection of

Circular Orders and Judgments, published under the authority of the Judicial Commissioner in 1881. The opinion delivered by the Court throws so much light on the practice relating to mixed marriages in Burma, and the position held by the wife and children when there is a lawful marriage, that it will not be out of place to quote a passage from it. After stating as a matter apparently not open to controversy that in order to constitute a valid marriage between a Mussulman and a Burmese woman, the woman must first apostatize and embrace Islam, the judgment proceeds as follows:—

"In a country like this, where a large number of Mahomedans from other countries have taken up their residence, and in very many cases their permanent abode, and when the natives have no race prejudices against alliances with foreigners, and whose religion offers no impediment to such, we find these mixed marriages everywhere existing among them, which have been duly celebrated according to Mahomedan rites; the wife having previously renounced her own religion and embraced that of her husband. Such an alliance is not regarded by either party as one of a temporary character, or in any way partaking of concubinage such as the *liaisons* which at one time prevailed here between Europeans and the women of the country, but as a formal and a binding marriage. It only requires a short experience of this country to know that these marriages are regarded amongst the Mahomedan community as being of as binding a character, and as conferring on the wife as honourable a position in the family as if she had been of Mahomedan descent, for she holds the same position as the husband's other wife does, if he happens to have another. The offspring likewise of these marriages are brought up in the Mahomedan faith, and are acknowledged by their father as his legitimate children, and at his death share his property as such. The Burmese wife also takes the wife's share, if she is the only one, or divides it with the other or others as the case may be; and these rights, both as regards the children and the wife, are recognized by our Courts."

If this be a correct description of the position of a Burmese woman lawfully married to a Mahomedan settler in Rangoon, it certainly would require a very violent presumption in favour of marriage to enable the Court to hold that Mah Thai was lawfully wedded to Abdul Hadi. It is tolerably obvious that neither Abdul Hadi nor Mah Thai regarded the ceremony which preceded their cohabitation in the light of a lawful and binding marriage. On this point their Lordships are glad to find themselves entirely in accord with the Court below.

1893

ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM.

The only question remaining for consideration is the question of acknowledgment, with which the learned Recorder dealt in rather a summary way. The learned Counsel for the respondent did not deny that Abdul Hadi might have married Mah Thai, as no doubt he might have done if she had embraced Islam, nor did they contend that the intercourse between Abdul Hadi and Mah Thai was of such a character as to prevent the possible legitimation of the offspring. Their contention was that there was no acknowledgment in the legal and proper sense of the word, although there may have been an admission of paternity.

The learned Counsel for the appellant cited various texts, which, taken apart from the context, would seem to show that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the status of legitimacy. It is not in their Lordships' opinion necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different from that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board which is clear upon the point. The question arose in the case of *Ashruff-ood-dowla Ahmed Hossein* v. *Hyder Hossein Khan* (1). There it was contended that the claimant, who was defendant in the suit and respondent on the appeal, had been acknowledged by his putative father. The fact of acknowledgment was denied by the appellant, and a deed of repudiation was set up, in which the father expressly repudiated the claimant as his son. An issue was framed in these terms: "Has the deed of repudiation the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?" In the course of their judgment (p. 104 of the report) their Lordships comment upon that issue. It was, they said, "very correctly framed. It substitutes, for the ambiguous word 'sonship' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of "legitimacy as a son." It is clear that it is in

(1) 11 Moo. I. A., 94.

that sense that the term "acknowledgment" is used in a later passage of the judgment which has often been cited, where their Lordships say "a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, expressed or implied, directly proved or presumed."

It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the appellant is accepted as true in every particular, comes to nothing more than an admission of paternity which was not intended to have the serious effect of conferring the status of legitimacy. A witness is produced who says he accompanied Abdul Hadi on his second visit to Mangi, and that Abdul Hadi told him that he was going to see his son. And there is some other evidence to the like effect. Then there is some evidence that Abdul Hadi, though he had no property, left a will, bequeathing everything to his brother Hadji Husain, in which he mentioned that he had offspring in Burma. According to one witness he named the offspring as "Abdul Razak," and expressed a wish that his brother should give him "something." The will it seems was sent to Hadji Husain, but it is not forthcoming, nor was it acted upon. Assuming however every word that is said about it to be perfectly true, the evidence falls very far short of such an acknowledgment as would confer the status of legitimacy upon an illegitimate child.

Their Lordships, therefore, in the result agree with the learned Recorder in thinking that the appellant's claim fails, and they will humbly advise Her Majesty that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Lattey & Hart.*

Solicitors for the respondents: Messrs. *Bramall & White.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

W. STALKARTT (DEFENDANT) *v.* GURU DAS KUNDU CHOWDHRY AND OTHERS (PLAINTIFFS) AND OTHERS (PRO FORMA DEFENDANTS.)*

1894 *Feb. 22.*

Bengal Tenancy Act (VIII of 1885), section 61—Deposit of rent in Court—Bonâ fide doubt of tenant as to who is entitled to rent—Costs, where conduct of defendant did not make litigation necessary.

The deposit of rent in Court under section 61 of the Bengal Tenancy Act (where the tenant entertains a *bonâ fide* doubt as to who was entitled to receive it) operates as an acquittance ; and where such deposit is proved as a defence to a suit for rent, the suit should be dismissed. Where in such a suit the defendant is found to have been not to blame for the litigation, he is entitled to his costs.

THIS was a suit by some fractional shareholders of an estate to recover arrears of rent with interest on account of two *jamas* of Rs. 37 and Rs. 25-11-5 *gundas* for the years 1294, 1295 and 1296 and the first three quarters of 1297. The remaining shareholders were made co-defendants, and the rents due to the whole sixteen annas proprietors were claimed in the suit. with the allegation that the rents were payable jointly and the co-defendants had declined to join in the suit as plaintiffs.

The defendant admitted holding the *jama* of Rs. 37 under the plaintiffs and *pro formâ* defendants, but stated that he had deposited the amount of rent sued for in Court under section 61 of the Bengal Tenancy Act, and had obtained receipts for it under section 62. He therefore submitted that as to this the suit should be dismissed, the plaintiffs having their remedy by applying to the Court where it was deposited. As to the *jama* of Rs 25-11-5 the defendant did not admit holding it under the plaintiffs and their co-sharers, but he stated that having *bonâ fide* doubts as to whether they or one Roma Nath Ghose were entitled to receive the rent, he had deposited the rent for the period in suit under clause (*d*), section 61 of the Bengal Tenancy Act, and had obtained receipts from the Court under section 62,

* Appeal from Appellate Decree No. 1674 of 1892 against the decree of Babu Hemangao Chunder Bose, Subordinate Judge of Hooghly, dated the 30th of June 1892, modifying the decree of Babu Jadub Chunder Sen, Munsif of Howrah, dated the 25th of September 1891.

and submitted that these receipts operated as acquittances for the amount claimed in the suit. He also contended that both *jamas* were payable annually, and that the plaintiffs were not entitled to interest.

The Munsif found that the deposits of rent had been proved. He said :—

"It is clear from sections 61 and 62 of the Bengal Tenancy Act and the explanation given of them in the case of *Sirdhar Roy* v. *Rameswar Singh* (1) that these deposits are to be taken as sufficient payments by the tenant, unless the plaintiffs succeed in showing that the circumstances are otherwise than what was stated by the tenant while making the deposits, and that the tenant is to blame for the litigation. The plaintiffs in this case admit that the rents are payable jointly to the plaintiffs and the co-defendants, and there is no person empowered to receive the rents on behalf of all the co-sharers. So I do not think it was improper for the tenant to have made the deposits with respect to the *jama* of Rs. 37. As to the other *jama* the deposits are under clause (*d*), section 61. Copies of judgments and decrees filed as exhibits show that the plaintiffs and their cosharers got decrees with respect to this *jama* against the defendant. But it also appears that Roma Nath Ghose, the heir of Khelut Chunder Ghose, had obtained rent decrees against the defendant with respect to this *jama*. So long as the question is not settled by a regular suit between the plaintiffs and the co-defendants on one side, and Roma Nath Ghose on the other, the tenant cannot be blamed for his entertaining a doubt as to who is legally entitled to receive the rent. Neither party would be bound by the decree obtained by the other party against the tenant. Exhibit II. shows that the Calcutta High Court in a previous suit between the plaintiffs and the defendants gave their support to such a doubt. I hold, therefore, that the tenant entertained *bonâ fide* doubt, and is not to blame for this litigation, and the deposits should be taken as sufficient payments with respect to both the *jamas*."

The Munsif also found that the *jamas* were payable quarterly, and that the defendant was liable to pay interest on each instalment. He held that the plaintiffs and co-defendants were entitled to the rents sued for, and gave a decree for the whole amount with interest Rs. 11-2-5, and costs only for the amount claimed for 1297.

The Subordinate Judge, on appeal, held that the rent was payable yearly and not quarterly, and therefore the plaintiffs were not entitled to the interest allowed by the Munsif. In other respects he affirmed the decree of the Munsif, and ordered that each party should pay their own costs of the appeal.

(1) I. L. R., 15 Calc., 166.

1894

STALKARTT v. GURU DAS KUNDU CHOWDHRY.

From this decision the defendants appealed to the High Court, on the grounds that on the facts found and admitted the suit should have been wholly dismissed with costs; that the Court having found that the *jama* of Rs. 25-11-5 *gundas* had been properly deposited on the ground of doubt of title, ought to have dismissed that portion of the suit as against the defendant, and should have held that no adjudication ought to be made of the issue as to whether the plaintiffs or Roma Nath Ghose was entitled to the rent, except in a suit between the plaintiffs and Roma Nath Ghose; and that the Subordinate Judge, having found that the rent was payable in one annual *kist*, the suit for the three quarters of the year 1297 ought to have been dismissed as premature.

Mr. *L. P. Pugh* and Babu *Dwarka Nath Chuckerbutty* for the appellant.

Dr. *Rash Behari Ghose* and Babu *Boidonath Dutt* for the respondents.

The judgment of the Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

This was a suit brought by the plaintiffs for arrears of rent for the years 1294, 1295, 1296 and three quarters of 1297. The defence was that the rent for this period had been paid into Court under section 61 of the Bengal Tenancy Act, because the tenant entertained a *bonâ fide* doubt as to who was entitled to receive the money. The defendant said that the rent was payable yearly, and that the rent for 1297 was paid into Court shortly after the suit was brought, *viz.* at the close of the year 1297.

The Munsif found as a fact that the defendant had a *bonâ fide* doubt as to who was entitled to receive the rent, and was not to blame for the litigation, and he held that the deposits must be taken as sufficient payment, and that this amounted to an acquittance for the rent due, and he gave the plaintiffs a decree for the whole amount of rent and for interest on the ground that the rent was payable quarterly and for the costs of the suit in respect of the rent for 1297, that payment not having been made until after the suit was brought. Although the Munsif gave a decree for the whole amount claimed, he directed that, out

of the monies due, the amount deposited should be deducted and that execution of the decree should proceed for the balance.

1894

STALKARTT v. GURU DAS KUNDU CHOWDHRY.

After taking further evidence the Subordinate Judge came to the conclusion that the money was not payable quarterly but yearly, and therefore that the plaintiff was not entitled to interest, and he altered the decree of the Munsif by disallowing interest, but he did not interfere with the order for costs.

It is contended here, in second appeal, that the only course for the Subordinate Judge was to dismiss the suit, and we think that was the proper course for him to follow, as the rent deposited under section 61 operated as an acquittance. It is further contended here that the suit must be dismissed with costs. The ordinary rule is that the person who is to blame for the litigation should pay the costs. It is found that the defendant was not to blame, and there is no reason why he should not get his costs. The decrees of the lower Courts will be set aside and plaintiffs' suit dismissed with costs in all the Courts.

It is found that the rent for the three quarters of 1297 was not due. Therefore the suit in respect of that is premature, and as the rent for this period is in deposit it is not necessary to make any order as to that.

Appeal allowed.

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep and Mr. Justice Trevelyan:

NARAYANI DASI (PLAINTIFF) *v.* ADMINISTRATOR-GENERAL OF BENGAL AND OTHERS (DEFENDANTS).*

1894 *March* 16.

Hindu Law—Will—Construction of Will—Right of daughter to maintenance after her marriage—Married daughters in good circumstances—Trust for maintenance—Costs.

A Hindu testator, after making the Administrator-General of Bengal executor and trustee of his will, and giving his daughter an annuity of Rs. 5 a month for her life, provided for the payment to *G. C. B.*, whom he consti-

* Original Civil Appeal No. 33 of 1893, in Suit No. 6 of 1893.

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

tituted the guardian of his daughter and of his only son during their minority, of the sum of Rs. 225 " monthly and every month for the maintenance and education of my said son and the support of my said daughter and such other persons as live in my house and are supported at my expense," and further provided that all " the residue of my estate, moveable and immoveable, with all accumulutions and additions " should be conveyed to his son on his attaining majority, " subject nevertheless to the trust of maintaining my said daughter." The daughter had married a man of means and did not need any maintenance. *Held*, in a suit by the daughter for a construction of the will and for a specific sum to be set apart for her maintenance, that the plaintiff was not entitled to anything by way of a separate allowance for maintenance ; she was only entitled under the will (apart from her annuity of Rs. 5 a month) to be provided for in case she were otherwise unprovided for.

Where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs. The suit was therefore dismissed with costs.

APPEAL from a decision of Norris, J., dated 7th July 1893.

Suit brought on 4th January 1893 for the construction of the will of one Judunath Mitter, the provisions of which, so far as they are material to this report, were as follows :—

" This is the last will and testament of me, Judunath Mitter, of Aheeretollah Street in the Town of Calcutta, land-holder. I give the whole of my moveable and immoveable estate to the Administrator-General of Bengal for the time being, whom I appoint executor and trustee of this my will upon the trusts following, that is to say :—

" *Firstly*, to pay my debts, funeral and testamentary expenses.

" *Secondly*, to pay out of the income of my estate the following annuities : (*d*) to my youngest daughter, Narayani Dasi, during her natural life, Rs. 5 per month, the same to be paid to her guardian hereinafter appointed during her minority.

" *Fourthly*, to pay to Babu Gopal Chunder Bose, the husband of my elder daughter, Srimati Nobinkali Dasi (whom I appoint guardian of the persons of my only infant son, Bhutnath Mitter, and my younger daughter, Srimati Narayani Dasi, who is also an infant) the sum of Rs. 2,500 upon the marriage of the said Srimati Narayani Dasi for the expenses of such marriage, and I direct that she is to have all the personal ornaments left by my late wife Srimati Kisto Babiney Dasi deceased.

" *Fifthly*, to pay out of the income of my estate to the said Gopal Chunder Bose, or to such other person or persons as he may by writing under his hand appoint as guardian in succession to, or association with, or substitution of, himself during the minority of my said infant son Bhutnath Mitter, the sum of Rs. 225 monthly and every month for the maintenance and education of my said son, and the support of my said daughter, and such other persons

as now live in my house and are supported at my expense, and to invest the surplus in Government securities for the benefit of my said son.

"*Sixthly*, to make over and convey the rest and residue of my estate, moveable and immoveable, with all accumulations and additions, to the said Bhutnath Mitter and his heirs on his attaining majority, subject nevertheless to the trust of maintaining my said daughter, and the payment of the annuities hereinbefore mentioned and subject also to the following conditions and limitations, that is to say :—'In case the said Bhutnath Mitter should die without issue and before attaining majority I direct that my residuary estate shall pass to my said two daughters and their heirs absolutely in equal shares subject to the payment of the said annuities.—Dated 20th November 1876.'"

The facts of the case are sufficiently stated in the judgment appealed from, which, so far as is material, was as follows:—

NORRIS, J.—"This suit is brought for the construction of the will of one Judunath Mitter, who died on 21st November 1876. The will was prepared in the office of a well-known attorney practising in this Court and was executed by the testator on the day before his death.

"The testator died, leaving two daughters, Nobinkali Dasi then and now the wife of the defendant Gopal Chunder Bose; the plaintiff then unmarried, now the wife of Jeebun Kristo Ghose, and an only son, the defendant Bhutnath Mitter, then about four years old.

"The will is in these terms (see *ante* pp. 684, 685.)

"The plaintiff alleges that probate of the will was granted to the Administrator-General in February 1877; that it was only in the early part of the year 1887 that she became aware that the will contained any provisions for her benefit; that she made inquiries from the defendant Gopal Chunder Bose, and he then informed her that a legacy of Rs. 5 a month was given to her by her father's will; that she never received any payment whatever in respect of the legacy until December 1892 when she received from the Administrator-General the sum of Rs. 960 in respect of the arrears of the legacy.

"I may take it that Rs. 960 was practically a payment in full from the testator's death till this suit was brought. The plaint further alleges that in August 1892 the defendant Bhutnath Mitter informed the plaintiff that he was ready to take over the estate of his father from the Administrator-General, and that

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

the Administrator-General, before transferring the estate to him, required a letter from her and her husband to the effect that she would look to the defendant Bhutnath Mitter, and not to the Administrator-General, for payment of the legacy of Rs. 5 a month and the arrears thereof.

"The plaint further alleges that disputes and differences have arisen between the plaintiff and the defendants respecting the true construction of the will, and this suit is now brought for construction of the will, and if necessary for administration. Various accounts are asked for; and what the plaintiff substantially asks is, that under the 6th clause of the will she may be declared entitled, as of right, to maintenance out of her father's estate; and she prays for a declaration to that effect, and she asks for an enquiry by an officer of the Court, and to have an account taken, of what sum is necessary for her maintenance and, if necessary, to have a sum set apart to meet the sum reported to be sufficient.

"It is not disputed that she is entitled to the sum of Rs. 5 a month, but it is argued that she is not entitled to a declaration, as a *bonâ fide* offer has been made to secure that sum.

"In the 4th clause of the will the testator intended to provide for the plaintiff's marriage, and to that end directs that Rs. 2,500 should be paid to Gopal Chunder Bose to meet the marriage expenses. Whether the plaintiff's father negociated her marriage or knew to whom she was going to be married, or whether he did not know, or whether Gopal Chunder Bose carried out the negotiation, does not appear, nor does it matter.

"Then in the 5th clause of the will, so far as it relates to the plaintiff, the testator makes provision for the interval between his decease and the plaintiff's being given in marriage, and the further period during which the girl would not be permanently residing with her husband, but would be making visits to her father's house before she took up her abode with her husband. That was the object of the 5th clause. It directs the Administrator-General to pay Rs. 225 a month to Gopal Chunder Bose, and Gopal Chunder Bose having been appointed guardian of the two children is directed how to employ the Rs. 225 a month.

"The difficulty has arisen from the presence of the 6th clause, which directs the executor and trustee to convey the estate to Bhutnath Mitter on his attaining majority, subject nevertheless to the trust of maintaining his daughter, the plaintiff, and the payment of the annuities mentioned. The sole difficulty arises in the construction of the words "subject nevertheless to the trust of maintaining my said daughter." Does the son take the estate clothed with the obligation in any and every case to maintain his sister, or to do so under certain circumstances only?

"I am of opinion that there is no obligation on the son to maintain his sister in any and every case. What I think the testator meant to do was to provide for the contingency of his daughter not being maintained by her husband, either on account of the husband falling on evil days, or their not agreeing, or from other cause. What the testator in effect says to his son is this: "If your sister is not being maintained as she should be, you must support her, you must not let her want." Now it happens that the lady married a gentleman of means, and is being well maintained. What her general rights are it is not necessary to determine. I think in my judgment it is enough to say that such circumstances have not arisen as to entitle the lady to ask for this declaration. In my judgment therefore the suit fails. * * * *

It has been said that the will is a perplexing and obscure one. I don't think the mere fact that a suit has been brought ought to induce me to say that the will is obscure and perplexing. For my own part I cannot say there is any obscurity about it, and I do not see any reason why, in dismissing the suit, I should not, in accordance with the usual rule, direct the unsuccessful party to pay the costs. I must dismiss the suit, and with costs on scale No. 2."

From this decision the plaintiff appealed mainly on the grounds that the Court ought to have held that the plaintiff was entitled to maintenance from the estate, and ought to have fixed the amount of maintenance, or ordered a reference as to the sum, and given her a decree with arrears, and also to have decreed the amount due in respect of the annuity of Rs. 5 a month; and that the costs ought to have been ordered to be paid out of the estate.

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

Mr. *Woodroffe*, Sir *Griffith Evans*, and Mr. *Bonnerjee* for the appellant.

The *Advocate General* (Sir *C. Paul*) and Mr. *O'Kinealy* for the respondent Bhutnath Mitter.

Mr. *Pugh* and Mr. *Evans Pugh* for the Administrator-General.

Mr. *Woodroffe*, as to the plaintiff's right to maintenance, cited the following cases as supporting the right: *Kilvington* v. *Grey* (1), *Soames* v. *Martin* (2), *Broad* v. *Bevan* (3), *Jubber* v. *Jubber* (4), *Hall* v. *Robertson* (5), *Williamson* v. *Jodwell* (6), *Badham* v. *Mee* (7); and the cases of *Carr* v. *Living* (8), *Staniland* v. *Staniland* (9), *Lamb* v. *Eames* (10), and *Mussoorie Bank* v. *Raynor* (11) were distinguished; and it was contended that the plaintiff was at any rate entitled to the annuity of Rs. 5 a month which should have been secured to her by the decree. It was also submitted that the plaintiff was entitled to her costs, and the case of *Kaily Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (12) was referred to as to the principle on which costs should be given.

Mr. *Bonnerjee*, on the same side, pointed out that by the entire dismissal of the suit the plaintiff had been precluded, having regard to section 13 of the Civil Procedure Code, from ever coming forward to ask for maintenance under clauses 5 and 6 of the will. There is no question that she is entitled to Rs. 5 a month under the will, so that the suit could not have been properly dismissed with costs. There should at any rate have been a decree for that and a declaration reserving all future right to maintenance. As to the principles to be observed in the construction of Hindu wills the case of *Soorjeemoney Dassee* v. *Denobundoo Mullick* (13) was referred to. The right to maintenance does not depend on her living in the family-house, and it was impossible, according to Hindu views, that the father should have contemplated his daughter remaining unmarried. Costs should

(1) 10 Sim., 293.
(2) 10 Sim., 287.
(3) 1 Russ., 511, note.
(4) 9 Sim., 503.
(5) 4 DeGex. M. and G., 781.
(6) L. R., 13. Ch. D., 564.
(7) 1 Russ. and M., 631.
(8) 28 Beav., 644.
(9) 34 Beav., 536.
(10) L. R, 6. Ch., 597.
(11) I. L. R., 4 All., 500; L. R., 9 I. A., 70.
(12) I. L. R., 8 Calc., 378 (392).
(13) 6 Moo., I. A., 526 (550).

be paid out of the estate, the plaintiff being entitled to ask for the construction of the will, and such construction being doubtful and obscure.

The *Advocate General* for the respondent Bhutnath Mitter.—The annuity of Rs. 5 a month had been paid up to the date of the suit, so there was no need to make a decree as to that. It was not necessary to secure it to the plaintiff, that being already sufficiently done by the will—see *Greender Chunder Ghose* v. *Mackintosh* (1). As to maintenance, there is no right to have any specific sum allotted to her as the plaintiff asks. If she were not properly maintained otherwise, she would have a right to go back to her father's house—Shama Churn Sircar's Hindu Law, 1878, p. 611, where it is said that this is conformable to the Dayabhaga. A daughter living away from her father for no sufficient reason is not entitled to maintenance—*Ilata Shivatri* v. *Ilata Narayanna Nambudri* (2); Colebrooke's Digest, Vol. 3, p. 5. She must be a member of the household for the time being; it cannot be that if she goes away she is entitled to be maintained.

The following were also referred to as to maintenance: Bhuttacharji's Tagore Law Lectures, "Joint Hindu Family," pp. 368, 369; Dayabhaga, Chapter XI, section 1, articles 22, 23; Mayne's Hindu Law, 5th edition, paras. 408, 417; Strange's Hindu Law, p. 171; *Chandra Bhagabai* v. *Kashinath* (3); *Savitribai* v. *Luxmibai* (4); *Gokibai* v. *Lakhmidas Khimji* (5). The right to maintenance depends on the requirements of the person named. As to there being a trust for maintenance—*Scott* v. *Key* (6); *Bowden* v. *Laing* (7); *Carr* v. *Living* (8); *Staniland* v *Staniland* (9); *Massey* v. *Massey* (10); Lewin on Trusts, 9th edition, p. 145, were referred to, to show there was no precatory trust. *Armstrong* v. *Clavering* (11); *Mahomed Shamsool Hoda* v. *Shewakram* (12), and Williams on Executors, p. 1812, were also cited.

Mr. *O'Kinealy* on the same side.—The plaintiff has no right to have a sum set apart for her maintenance, but only a right

(1) I. L. R., 4 Calc., 897.
(2) 1 Mad., 372.
(3) 2 Bom., 341.
(4) Bom., 584.
(5) I. L. R., 14 Bom., 490 (496).
(6) 35 Beav., 291.
(7) 14 Sim., 113.
(8) 28 Beav., 644.
(9) 34 Beav., 536.
(10) W. N. (1873), 76.
(11) 27 Beav., 226.
(12) 14 B. L. R., 226, L. R., 2 I. A., 7.

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

to be supported ("support" is the word used) if it were necessary, and it is not necessary. As to costs, where a suit is unnecessary the plaintiff must pay costs up to trial—*Fane* v. *Fane* (1). Here the arrears of the annuity had been paid when the plaintiff sued. *Coggan* v. *Allen* (2) gives the general rule as to costs. *Merlin* v. *Blagrave* (3), *Dyson* v. *Phillips* (4), and *Clark* v. *Henry* (5), were also referred to.

Mr. *Pugh* for the Administrator-General submitted he was not liable, having made over all the property to the defendant Bhutnath as directed by the will. The Administrator-General was not bound to give a conveyance, and Bhutnath is now in just as good a position as if a conveyance were granted. The Administrator-General is entitled to his costs.

Mr. *Woodroffe* in reply.

The following judgments were delivered by the Court (PETHERAM, C.J., and PRINSEP and TREVELYAN, JJ.) :—

PRINSEP, J.—The plaintiff is one of the daughters of the testator Judunath Mitter, deceased, and at his death was about ten years of age and unmarried. The other daughter had been married to a man of means. There was also a minor son aged about four years. Probate of the will was obtained by the Administrator-General on 22nd February 1877, and he administered the estate until the son, Bhutnath Mitter, came of age.

The plaintiff now asks to have the will construed by the Court and the rights of all parties under it declared. She also asks for payment of all arrears of maintenance due to her out of the estate, and for security for prompt payment in the future, and that for this purpose the necessary enquiries may be made. Lastly, she asks that the estate may be administered under orders of this Court.

In respect of the plaintiff the will gives her an annuity of Rs. 5 per month for her natural life. About this there is no dispute, and it is also clear that the arrears due to the plaintiff on account of this annuity up to 20th November 1892 were paid before this suit was brought on 4th January following.

(1) L. R., 13 Ch. D., 228.
(2) L. R., 23 Ch. D., 101.
(3) 25 Beav., 125.
(4) 10 H. L. C., 624.
(5) L. R., 6 Ch. D., 588.

The only matters in dispute are whether the plaintiff is under the sixth paragraph of the will entitled to any further allowance as maintenance, and, if so, in what amount.

In the fourth paragraph of the will provision is made for the marriage of the plaintiff, which has taken place.

Paragraphs 5th and 6th contain the following directions: (see paragraphs 5 and 6, *ante* pp. 684, 685)

It is unnecessary to recite the conditions and limitations, because they do not affect the present case, except in so far as they show that on the death of the son Bhutnath without issue, and before attaining majority, the residuary estate was to be divided equally between the married and unmarried daughters, subject to the payment of the annuities mentioned in the previous part of the will.

The learned Judge in the Court of first instance has found that the intention of the testator was to impose "no obligation on the son Bhutnath Mitter to maintain the sister in any and every case," but "to provide for the contingency of the daughter not being maintained by her husband on account of the husband falling on evil days, or their not agreeing, or from other cause," and that as she has "married a gentleman of means and is being well maintained," it is not necessary to determine what her general rights are, the circumstances entitling her to such a declaration not having arisen. The suit was accordingly dismissed with costs payable by the plaintiff.

In appeal it is contended that the plaintiff is entitled to a decree for the arrears due on her annuity under paragraph 2, clause (*d*) of the will, and to further maintenance under paragraph 6; that the amount so payable should have been ascertained and fixed; that she was entitled to a construction of the will, and consequently that the suit should not have been dismissed with costs, as the costs should in any case be borne by the estate. It is also contended that under the will the Administrator-General should not have made over the estate to Bhutnath Mitter except by a regularly executed conveyance, in which the trust of maintaining the plaintiff should have been recited and secured.

The question therefore really at issue is whether the plaintiff was entitled to any separate maintenance by a specific sum of money.

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

The testator was a Hindu gentleman, and the will was drawn up by a well-known Hindu attorney of this Court, so that, in endeavouring to ascertain the intention of the testator, we must assume that, unless anything be shown to the contrary from the express terms of the will, it was his object to provide for the family in accordance with the well-known principles of that law. The plaintiff, his youngest daughter, was approaching the marriageable age. Accordingly, as already stated, provision is made for that event. There is nothing to show that any arrangements had been made, or even that proposals had been made for a suitable husband. It is stated that, if the case had gone for trial, some evidence would have been forthcoming, but I observe that in her appeal the plaintiff has not asked for a remand for this purpose, but she has been contented to abide by the case as presented by the record. We must, therefore, take it that the testator was ignorant what were the means of the gentleman to whom his younger daughter was to be married. He provided for her during life by an annuity of Rs. 5 per month, and he further directed that during the minority of his son a certain sum (Rs. 225) should monthly be applied to the maintenance and education of his son and to the support of that daughter and such other persons as at the time of his will lived in his house and were supported at his expense, and he further directed that the surplus should be invested in Government securities for the benefit of his son.

The object of this, I take it, was to maintain the members of his family in his family dwelling-house after his death as during his life, and certainly not to give any members of that family a right to any separate allowance, if he or she chose to reside elsewhere. This sum was fixed and provision was also made for any surplus that might accrue. But it is stated that under Hindu law a person entitled to maintenance is not bound to reside with the family, and is entitled to a separate allowance, if he or she may prefer to live elsewhere However this may be, this does not appear to have been in the contemplation of the testator so far as this part of his will is concerned. The object was to preserve the family and household as they were at that time But this part of the will relates only to the time of the minority of his son, the residuary legatee, who has now come of age, so that the following paragraph (6)

has come into operation. That paragraph directs the executor and trustee appointed by the Administrator-General to make over and convey the estate to the son, subject nevertheless to the trust of maintaining the said daughter, the plaintiff, referred to in the preceding paragraph. The paragraph cannot in my opinion be read apart from paragraph 5. It appears to me that "the trust of maintaining my said daughter" in paragraph 6 refer to the objection imposed by paragraph 5, and that the object of this provision is to ensure for her the same rights and privileges after the majority of the son as were provided for her during his minority. It was never in contemplation of the testator that the style of his family dwelling-house should be reduced, but that a home should always be open to his daughter whenever she might require it. To provide against want she had already been given an annuity of Rs. 5 per month. The trust created by paragraph 6 is in my opinion merely a revival of that created by paragraph 5 which expired on the son's attaining majority; on her marriage the plaintiff would in strict law be entitled to nothing out of her father's estate. She would practically cease to be a member of that family in regard to maintenance, and have such claims only on her husband. It is only when a daughter, such as the plaintiff, is reduced to poverty that she has a claim to be supported by her father's family.

The plaintiff admittedly is far from being in such a condition. Consequently it was not in contemplation of her father, a Hindu, that she should under any circumstances receive a separate allowance from his estate to the reduction of the means of his son, the residuary legatee. I understand the provision in paragraph 6 as conferring no separate rights on the daughter to be separately maintained, and there seems to be no indication why in such respects he should be inclined to treat her differently from her elder sister, who had married a husband in easy circumstances during the testator's lifetime. The annuity of Rs. 5 per month, and the fact that on the death of the residuary legatee, the son, without issue, or during minority, the estate was to be equally divided between the two daughters, *subject to the payment of the annuities* (and here I may observe no mention is made of the trust of maintaining the younger daughter) sufficiently shows this.

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

For these reasons I am of opinion that the plaintiff is not entitled, under paragraph 6 of the will, to anything by way of a separate allowance for maintenance. I am however of opinion that she is entitled to a decree for the amount of her monthly annuity from the last day of payment, 20th November. It does not however appear that she has ever demanded this from the defendant, and therefore she is entitled only to that amount.

On consideration I think that the construction of this will is not so difficult as to have required the assistance of this Court, and therefore it is not a case where the estate should bear the costs.

The plaintiff is entitled to a decree for Rs. 5, the arrears of maintenance and to nothing else. In that respect the decree of the lower Court will be altered. Apart from that alteration the appeal is dismissed with costs on scale No. 2.

TREVELYAN, J.—The real question in this case is as to the meaning of the words "subject nevertheless to the trust of maintaining my said daughter." These words, there is no doubt, create a trust, but the dispute is as to the nature of the trust which they create. The plaintiff contends that under these words she is entitled to receive from the estate, which was her father's, a sum of money sufficient for the purpose of providing her with food, lodging and raiment, irrespective of whether she has other means of providing herself with those necessities of life. On the other hand, the Administrator-General and her brother contend that she is only entitled to be so provided when she is otherwise unprovided for.

Reference was made by both sides to the terms of the 5th clause of the will. That clause provides for the period of the minority of Bhutnath Mitter, and only for that period. The words "support of my said daughter" in the 5th clause are, I think, equivalent to the words "maintaining my said daughter" in the 6th. The extent of the maintenance and the conditions, if any, under which it should operate, were intended to be the same in both clauses.

Whatever "subject to the trust" means, subject to the said trust, or subject to another trust, the words used are so similar as to be intended to convey a similar meaning.

There is no reason why there should be any difference between the two periods. The question still remains as to what the testator meant by "support" or "maintaining."

Counsel for the appellant relied upon the circumstance that the 5th clause would extend to a period when the testator must have known that his daughter would be married, and of this there is no doubt. No Bengali Kayasth would contemplate his daughter being unmarried after she had attained the age of puberty. As this girl was twenty-four years old when her brother came of age, her father must have known that she would certainly be married before her brother attained his majority.

This circumstance makes no difference in the construction. If the defendant's contention be correct the father might have equally wished to provide for his daughter in the case of her becoming destitute during her brother's minority as after it. For eleven or twelve at least of the years covered by the 5th paragraph she would be married and subject to the same chances and conditions as during the subsequent period.

I think it is clear that the testator meant the same thing in the 5th and 6th paragraphs of the will. The question is what he meant.

As far as I can see a Hindu testator, or settlor, in providing for the maintenance of a child or other person, would mean exactly the same as an English testator, or settlor, would by a similar provision. I can see no reason for any difference. If there be any, I should think it the more likely that the Hindu father would be the less inclined of the two to give his daughter an annual provision of food and raiment irrespective of her necessities, and thus make her a burden upon his sons. When a Hindu girl marries, she completely ceases to have anything to do with her father and his family. She becomes one with her husband and belongs to his family. Counsel for the respondents has contended that under the Bengal school of Hindu law, a destitute daughter is entitled to maintenance. This right is denied by Counsel for the appellant.

If this right does not exist the case is brought the nearer to that of an English father and daughter. I think that a provision of this kind in the will of a Hindu means the same as, or at any rate not more than, a similar provision in the will of an English-

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

man. We have been referred to several English authorities on that subject, and amongst them I can find no case wherein a provision for the maintenance of A being charged on a gift to B provision has been allowed irrespective of the wants of A. There is, however, some authority to the contrary. In Lewin on Trusts, 8th edition, p. 139, we find: "It can hardly be maintained, on the one hand, that when a child has attained majority, and is fairly launched into the world, and is making a livelihood, the trust is to continue; and, on the other hand, if a child be willing to remain at home, and no reasonable objection can be made to it, the person bound by the trust cannot refuse maintenance on the mere ground that the child has attained twenty-one, that age being in England the age of majority.

In *Carr* v. *Living* (1), the Master of the Rolls says: "The view I take of these cases, although I do not know whether it has been decided, is this: Where property is given to a wife for the support of herself and children, it is paid to her for the benefit of herself and children, and the Court does not inquire how it is applied, unless the children are not supported at all. But where the children are otherwise provided for, and do not require support or maintenance, they are not entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education and support." In *Thorp* v. *Owen* (2), although the point did not arise, the observations of the Vice-Chancellor at p. 613 of the report point in the same direction. So do the observations of the Master of the Rolls in *Scott* v. *Key* (3) at p. 293 of the report. *Broad* v. *Bevan* (4), which was relied upon by the appellant, has nothing to do with the question. All that was asked for there by Counsel was a reference to the Master, who, "taking into account the circumstances of Ann, will determine what provision for her will answer the intention of the testator." I would accordingly hold that the trust for maintenance in this case is only intended to apply in the event of the daughter being otherwise unprovided for.

The plaintiff does not make any such case here, so her claim to maintenance fails.

(1) 28 Beav., 644 (647.)
(2) 2 Hare, 607 (613.)
(3) 35 Beav., 291 (293.)
(4) 1 Russ., 511.

1894

NARAYANI DASI v. ADMINISTRATOR-GENERAL OF BENGAL.

The plaintiff has also contended that she is entitled to require the Administrator-General to execute a conveyance to Bhutnath Mitter. Bhutnath might be entitled to require such a conveyance to be executed, but I cannot see how the plaintiff could require such conveyance, or would be in any way injured by the absence of such a conveyance. In the absence of authority I decline to hold that any such conveyance can be enforced by the plaintiff.

I agree with Mr. Justice Prinsep as to the form of the decree which we should make.

PETHERAM, C. J.—For the reasons given by the other two learned Judges who heard this appeal I agree in the conclusions at which they have arrived.

Attorneys for the appellant: Messrs. *Dignam, Robinson & Sparkes.*

Attorney for the respondents: Babu *Gonesh Chunder Chunder.*

J. V. W.

TESTAMENTARY JURISDICTION.

Before Mr Justice Sale.

IN THE GOODS OF KAMINEYMONEY BEWAH (DECEASED.)

1894 *April* 24.

Probate—Revocation of Probate—Interest entitling person to apply for revocation—Hindu Law—Inheritance—Succession to property of degraded and outcaste woman—Right of her husband's family in her property acquired while degraded.

In an application for revocation of probate of the will of *K*, which had been granted to *D*, it appeared that *K* was a Hindu widow who many years ago left her husband's family dwelling-house and became a woman of the town; that she had lived under the protection of *D* for 35 years; that when she came to *D*, she had no property, but that all the property she left had been acquired by her while in a degraded and outcaste state. *Held*, that the applicant, as her husband's sister's son, had no interest in her estate entitling him to maintain the application.

The general rule, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste, applies with even greater force as between her and the members of her husband's family. Those members therefore have no right of inheritance in property acquired by a woman who leaves her husband's family and becomes degraded.

IN this matter an application was made by Mr. *Chowdhry* for a rule on the petition of one Hom Chunder Dass, which alleged

1894

IN THE GOODS OF KAMINEYMONEY BEWAH.

that the petitioner was the husband's sister's son of the deceased Kamineymoney Bewah, who died on 28th March 1893 in Calcutta, leaving the petitioner, and a sister, named Atulmoney Dassee (who resided at Serampore), her only surviving relatives; that one Debnath Dey had, on 11th July 1893, obtained probate from the High Court of a will alleged to have been executed by Kamineymoney Bewah on 26th March 1893, in which Debnath was appointed her executor, and by which, after making a bequest to her sister, the deceased had left the whole of her property to Debnath, and it was in his possession, and that there were grounds (which he stated) for supposing that the will was not a genuine one.

The rule was issued calling on Debnath to show cause why the probate granted to him should not be revoked and the will proved in solemn form.

At the hearing of the rule it was objected that the applicant, Hem Chunder Dass, had no such interest in the estate of the deceased as entitled him to maintain the application for revocation of probate.

Mr. *T. A. Apcar* and Mr. *Singha* showed cause.

Mr. *R. Mittra* and Mr. *Chowdry* in support of the rule.

The further facts and the arguments and cases cited are sufficiently stated in the judgment.

SALE, J.—On the 11th July 1893 one Debnath Dey, as the sole executor appointed by the will of Kamineymoney Bewah, dated the 26th March 1893, applied for and obtained probate thereof from this Court.

Subsequently Hem Chunder Dass, alleging himself to be the husband's sister's son of the deceased, obtained a rule calling on Debnath Dey to shew cause why the probate granted to him should not be revoked, and why the alleged will should not be proved in solemn form.

In shewing cause against the rule, Debnath Dey alleged that Kamineymoney Bewah was a woman of the town, and had been so for thirty-five years previous to her death; that she had lived under his protection for the past thirty years; and that when she came under his protection, she had no property whatever, and that the property left by her at her death was acquired by her during the period she was living under his protection, and represented her

savings from gifts of money and ornaments made by him to her. Under these circumstances Debnath Dey, while not admitting the relationship set up by the applicant to the deceased, denied that he had any interest in the estate of the deceased entitling him to maintain the application.

It was then ordered that the matter should be set down for trial of the preliminary issue as to whether the applicant has a sufficient interest to maintain the application for revocation of probate. On the evidence adduced by the applicant, the following facts have, I think, been established :—

The deceased woman, Kamineymoney, was the widow of one Ram Coomar Dass, who died some 35 or 40 years ago, leaving his widow and an infant son and also a sister, Hurromoney, who was married to one Rammohun Dass.

Rammohun and Hurromoney took in adoption the applicant, Hem Chunder Dass. Both Rammohun and Hurromoney died long ago, leaving no issue but only Hem Chunder, their adopted son and sole heir.

After her husband's death Kamineymoney and her son continued to live in the family dwelling-house with her husband's relatives. The son died in infancy, and shortly thereafter, and about 35 years ago, Kamineymoney left the family dwelling house and became a woman of the town. From that time all connection and intercourse with the members of her husband's family ceased. Upon the affidavits filed by Debnath Dey, and in the absence of any contradiction, I think it appears sufficiently that the property left by Kamineymoney at her death consisted entirely of acquisitions made by her during the period of her degradation as the mistress of Debnath Dey.

It also appears that, besides the applicant, who it is proved is the husband's sister's son, Kamineymoney at her death left a natural sister, named Atulmoney, who is living at Serampore and is undegraded. These are the only relatives, members of her own natural family or of her husband's family, who were surviving at Kamineymoney's death. Atulmoney is a legatee under her sister's will, and a suit was instituted by her against Debnath to obtain payment of the legacy. Shortly after the institution of the suit the legacy was paid by Debnath. On these facts it is said that

1894

IN THE GOODS OF KAMINEY-MONEY BEWAH.

Hem Chunder Dass is under Hindu law the next heir of Kamineymoney, and as such heir has an interest in her estate entitling him to apply for revocation of probate and to have the alleged will proved in solemn form.

On the question of heirship or succession to the estate of a Hindu woman who has become degraded from caste by reason of prostitution—so far as such estate represents property acquired by her during the period of degradation—the text books on Hindu law are silent.

Mr. Mittra contends that according to Hindu law the right of succession is based upon the right or power of the claimant to confer spiritual benefits on the deceased, and that inasmuch as there is nothing in the text books to shew that an undegraded member of a family cannot confer such benefits on a degraded member, the right of an undegraded member of a family to succeed to the estate of a degraded member ought to be recognized.

On the other hand, there are decisions of the Courts in this country which go to show that the tie of kindred between the degraded member and the undegraded members of a family is broken, and that there is no right of succession on the part of the undegraded member to the estate of a degraded member.

The earliest authority for this proposition is a Bengal case decided by the Sudder Court—*Tara Munnee Dassee* v. *Motee Buneanee* (1). In that case a daughter born in wedlock claimed to succeed to the estate of her mother who had lapsed into prostitution as against the daughter born subsequent to the mother's degradation, and it was held that the plaintiff had no such right, the ground of the decision being that the conduct of the mother had entirely severed her from her natural family.

This case is referred to in Dr. Banerjee's Tagore Lectures on the Hindu Law of Marriage and Stridhan, page 402, as an existing authority. Moreover, the principle of the severance of the tie of kindred operating so as to extinguish the right of succession of an undegraded member to the estate of a degraded member has been expressly recognised and adopted in three cases decided by the Madras Courts—*Myna Bai* v. *Uttaram* (2), *Sivasangu* v. *Minal* (3)

(1) 7 Sel Rep., 273. (2) 2 Mad., 202.
(3) I. L. R., 12 Mad., 277.

and *Narasanna* v. *Gangu* (1). The last case no doubt relates to the question of the right of inheritance to the estate of a woman belonging to the class of dancing girls—a class of people having a peculiar status and governed, it has sometimes been said, by special customs or rules of inheritance. But the case in question does not appear to have been decided with reference to any special rule or custom. At page 134 of the report there occurs the following passage: "However that may be, it appears to be that it is immaterial how the property was originally acquired. It was, at the death of Lakshmi, the property of a dancing girl, and the question is who is the nearest heir to the dancing girl. The *general rule* is that the legal relation between a prostitute dancing girl and her undegraded relatives remaining in caste becomes severed, and in this view the defendant No. 6 is the only legal heir to Lakshmi."

The *general rule* here referred to is, I take it, the rule of the severance of the tie of kindred between the degraded and undegraded members of a Hindu family.

This is clear, I think, inasmuch as the decision in the case of *Sivasangu* v. *Minal* (2) is specially referred to and is followed, and in the latter case, at page 281 of the Report, the rule is referred to in these terms: "It was held by the Sudder Dewany Adawlut in *Tara Munnee Dassee* v. *Motee Buneanee* (3) that under Hindu law prostitute daughters living with their prostitute mother succeeded to the mother's property in preference to a married daughter living with her husband. The *ratio decidendi* was that the legal relation of a married and respectable daughter to her mother ceased when the latter became an outcaste."

If this principle is held to apply as between a degraded woman and the members of her own natural family, it would seem to apply with even greater force as between her and the members of her *husband's* family. Applying, therefore—as I think I am bound to do—this principle to the present case it follows that Hem Chunder Dass has no right to, or interest in, the estate of Kamineymoney as her heir. I am aware that in certain cases this Court has granted letters of administration to the estate of

(1) I. L. R., 13 Mad., 133. (2) I. L. R., 12 Mad, 277.
(3) 7 Sel. Rep., 273.

1894

IN THE GOODS OF KAMINEY-MONEY BEWAH.

prostitutes who have died intestate to members of their own natural family. I myself in the case of *In the goods of Sowdaminey Dassee*, April 28th, 1893, after consideration, granted letters of administration to the degraded natural sister of the deceased, but I did so, as in the case of an intestacy, and under the special power granted to the Court by section 41 of the Probate and Administration Act for the protection and preservation of the estates of deceased persons. These grants have been made in the exercise of the discretionary powers of the Court, and not as recognising any legal interest of the grantees in the estate of the deceased persons. I must hold, therefore, that the applicant Hem Chunder Dass has no interest in the estate of Kamineymoney entitling him to maintain the application for revocation of probate.

As the result the application is refused. The applicant must pay the costs of the trial of the issue, to be taxed on scale 2 and must also pay the costs of the rule.

Application refused with costs.

Attorney for Hem Chunder Dass: Mr. *C. H. Manuel.*

Attorney for Debnath Dey: Babu *R. C. Bose.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ghose, Mr. Justice Beverley, and Mr. Justice Rampini.

GOPENDRO CHUNDER MITTER AND OTHERS (PLAINTIFFS) *v.* MOKADDAM HOSSEIN AND OTHERS (DEFENDANTS.)*

1894 *March* 16.

Sale for arrears of rent—Bengal Regulation VIII of 1819, section 11—"Defaulting Proprietor"—"Defaulter"—Incumbrances created by previous putnidar—Mokurari lease, avoidance of—Voidable incumbrances.

In 1839 a *mokurari* lease was granted to the predecessors of the defendants by the then *putnidar* of a *putni* created in 1819. In 1848 the *putni* was sold for arrears of rent under the provisions of Bengal Regulation VIII of 1819, but the purchaser at that sale did not interfere with the *mokurari*. In 1885 the *putni* was again brought to sale under the same Regulation for arrears of rent, the default being made by one of the successors of the pur-

* Appeal from Appellate Decree No. 1711 of 1892, against the decree of J. Kelleher, Esq., District Judge of Burdwan, dated the 23rd of June 1892, reversing the decree of Babu Rajendra Kumar Bose, Subordinate Judge of that District, dated the 11th of June 1891.

chaser in 1848, and at this sale it was purchased by the plaintiffs. In 1890 the plaintiffs sued to set aside the *mokurari* lease, contending that they were, by virtue of their purchase, entitled to avoid all incumbrances created by any *putnidar* and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of section 11 of the Regulation restricted the plaintiffs to avoiding incumbrances, the acts of the immediate defaulter, and that, as the purchaser in 1848, and his successors in title previous to the defaulter in 1885, had not interfered with the *mokurari* lease, the plaintiffs could not have it set aside.

Held (RAMPINI, J., dissenting) that the plaintiffs were entitled to avoid the *mokurari*.

Held, *per* GHOSE and BEVERLEY, JJ., that having regard to the policy and principle of the Regulation a zemindar is entitled to bring a *putni* to sale in the same condition in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors.

Per GHOSE, J.—The *mokurari* lease was an incumbrance upon the *putni*, but inasmuch as section 11 distinguishes in clauses 1 and 2 between incumbrances and leases it might be regarded as the latter. If treated as an incumbrance it must be held to have *accrued upon* the *putni* by reason of the defaulting zemindar not having set it aside, though entitled to do so within the meaning of those words in clause 1. If treated as a lease the words in clause 2, *holder of the former tenure*, are wide enough to include any *putnidar* whether the defaulting or a previous holder.

Per BEVERLEY, J.—The words "defaulting proprietor" used in clause 1 of section 11 must be read as the "proprietor of the tenure in default," and were not intended to be restricted to the particular proprietor for whose default the tenure is brought to sale, and the word "defaulter" used in clause 2 of that section must be given a similarly wide interpretation.

THE plaintiffs, who were the purchasers of a *putni taluk* at a sale held under the provisions of Bengal Regulation VIII of 1819, sued to have a *mokurari* lease granted by a former *putnidar*, who held the *putni* previous to the *putnidar* for whose default it was brought to sale, set aside and declared void as against them, and to obtain mesne profits since the date of their purchase.

It appeared from the pleadings and evidence given at the hearing in the Court of the Subordinate Judge that the *putni* was granted in the year 1226 B. S. (1819) to one Ram Lochun Singh in the place and stead of a then outgoing *putnidar*. The *mokurari* sought to be set aside was granted in 1247 B. S. (1839) by one Radha Bullub Ghose, the then *putnidar*, in favor of the predecessors in title of the defendants.

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

In 1848 it appeared that the *putni* was brought to sale under the Regulation for arrears of rent, and it was then purchased by one Gopi Mohun, who, after his purchase, did not interfere with the *mokurari* but allowed it to stand. In 1885 the *putni* was again sold under the Regulation for default on the part of one Radhica Singh and his co-sharers, who were then the *putnidars*, and purchased by the plaintiffs *benami* in the name of one of their servants. The plaintiffs in April 1890 instituted this suit, contending that under the Regulation they acquired the *putni taluk* free from all incumbrances created by any former *putnidar*, and alleging that the defendants refused to surrender the *mokurari* and prevented the tenants paying them their rents.

One of the defendants denied that he was in possession, alleging a sale of his interest to third parties, while the remainder pleaded that the plaintiffs were not the purchasers at the sale in 1885; that the suit was a collusive one for the benefit of the former *putnidar*, who had allowed the tenure to be brought to sale for the purpose of attempting to set aside the *mokurari* and themselves purchased it *benami*; that the lease, not having been granted by the defaulting *putnidar*, it was binding on the purchaser, and that they (the defendants) were cultivators and had acquired rights of occupancy, and that therefore the plaintiffs were not entitled to obtain *khas* possession.

The Subordinate Judge found all the facts in favor of the plaintiffs, and gave them a decree, setting aside the *mokurari* lease and granting them mesne profits.

The only issue in the case material for the purpose of this report was that relating to the question as to whether the sale at which the plaintiffs purchased had the effect of transferring the tenure to them free of the incumbrance created by the former *putnidar*, that is to say, of the *mokurari* lease, or whether, by reason of that lease not having been in any way interfered with by Gopi Mohun, and not created by the defaulting *putnidar* himself, the plaintiffs' purchase did not entitle them to avoid it. Upon this question the Subordinate Judge decided as follows :—

"My answer to this question will be in the affirmative. The very case of *Nilmadhub Karmokar* v. *Shibu Pal* (1) quoted by the defendants is an

(1) 5 B. L. R. Ap. 18 : 13 W. R., 410

authority for the proposition that a *mokurari* lease is an incumbrance, and the sale of a *putni mahal* under Regulation VIII of 1819 has the effect of cancelling all incumbrances which have accrued to the *mehal* at the option of the purchaser (see section 11 of Bengal Regulation VIII of 1819.) As remarked by Sir Barnes Peacock (1) 'when a *putni* is sold by a zemindar under Regulation VIII of 1819 for arrears of rent, it is sold in the state in which it was created, and the purchaser is entitled to have it in the state in which it was created, notwithstanding any under-tenure or other incumbrance which may have been created by the defaulter.' It is hardly necessary to add that there is nothing to show that the grantor of the defendants' *mokurari* had power to that effect in the written engagement under which he held the *putni*.

"But it is contended by the learned pleader for the defendants that according to section 11 of Regulation VIII the only incumbrances which are liable to be avoided are those which were created by the outgoing *putnidar*, for whose default the *putni* was sold, and not those which were created by others than the last *putnidar*; and that as the plaintiffs have not been able to show that the *mokurari* holding of the defendants, which they seek to avoid, was created by the defaulters Radhica Singh and his co-sharers, the provisions of section 11 of Regulation VIII cannot avail the plaintiffs. This argument is no doubt ingenious, but it is not sound. It appears to me that the enactment in clause 1 of section 11 of Regulation VIII, that the *putni* tenure 'is sold free of all incumbrances that may have accrued upon it by act of defaulting proprietor, his representatives or assigns,' has reference, not simply to incumbrances created by the last *putnidar*, but to all incumbrances which have been imposed upon the *putni*, since its creation, either by the original *putnidar*, or by any other *putnidar* who has succeeded to the *putni* after him, and which have been suffered to exist down to the time when the *putni* was put up to sale. By adopting the narrow construction contended for by the defendants' pleader, *viz.*, that the words 'defaulting proprietor' in clause 1 of section 11 of Regulation VIII means the *putnidar* who made default, the consequences would be serious both to the zemindar and the auction-purchaser of the *putni*, for a person, after obtaining a *putni*, may sublet either the whole or a part of his interest in *dur-putni* at a low rent, on receipt of a large bonus, and may then transfer his *putni* rights to a third party, who makes default and the *putni* is sold; in that case both the purchaser and the zemindar would be powerless to avoid the *dur-putni* holding, because it was created not by the defaulter but by his predecessor, however prejudicial the existence of that *dur-putni* tenure might be to the exercise of the right conferred by section 11, that after the sale of a *putni* the purchaser is entitled to have the *putni* in the state in which it was created, and I take it to be that such could never have been the intention of the Legislature in view of the

(1) *Woomesh Chunder Goopto* v. *Rajnarain Roy*, 10 W. R., 15 (*at* p. 19).

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

anomaly pointed out above. In connection with this subject, it will be convenient to refer to a similar provision contained in section 16 of Bengal Act VIII of 1865, which is more explicitly worded, in that it states that the purchaser of an under-tenure sold under that Act acquires the under-tenure free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure. The effect of a sale for arrears of rent under Regulation VIII is substantially the same as that of a sale for arrears of rent under section 67 of Bengal Act VIII of 1869.

"I am therefore of opinion that the alleged *mokurari* tenure of the defendants is liable to be set aside at the instance of the plaintiffs who are purchasers of the *putni* to which the tenure is subordinate."

The defendants appealed. The material portion of the judgment of the District Judge was as follows :—

"The next question is whether an incumbrance created by a former proprietor is liable to be cancelled by the purchaser at a sale for arrears under the Regulation. One would have thought that such a provision was necessary for the protection of the 'indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure.' Yet no such provision is to be found in the section under consideration. It would seem to have been assumed that each new purchaser would avoid all incumbrances created by the last holder, and that there was no need to extend that right to incumbrances created by former defaulting proprietors. Whatever may have been the reason or intention, the power to avoid is conferred only with respect to 'all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees.' For the respondents it is contended that these words 'representatives or assignees' indicate that incumbrances, other than those created by the defaulting proprietor, may be cancelled. No doubt the words are not wholly free from ambiguity, and it is not difficult to conceive cases of incumbrance by a representative or assignee of the defaulting proprietor. But I fail to see how these words can alter the construction so as to make the clause include all former defaulting proprietors.

"The only direct authority on the question is the case of *Issen Chunder Kur* v. *Madhub Chunder Ghose* (1). It was a special appeal by the plaintiff-purchaser of a *putni taluk* under the Regulation, in a suit for enhancement of rent. The defendant set up an *istemrari potta* of the year 1217 B. S., but no further particulars are given except that the Judge found this *potta* to be good and valid, and dismissed the suit. In special appeal it was contended that a purchaser under the Regulation takes the *putni* free of all incumbrances, and that the *putni* is acquired by each succeeding purchaser in the same condition as when it was originally created by the zemindar. On this their Lordships observed : 'The 11th section of Regulation VIII., in our opinion, empowers

(1) 1 Rev. Jud. & Police Journal, 1863, p. 109.

the incoming *putnidar* only to rid himself of all incumbrances created by the defaulting proprietor, and it seems to us that the last part of the section refers to transactions in which the *putni* itself is dealt with in such a manner as to endanger the rights of the zemindar to his rent and to leases granted to under-tenants.' The word '*section*,' where last used, is apparently a misprint for '*clause*.' The Subordinate Judge has quoted a passage from the judgment of Sir Barnes Peacock in the case of *Woomesh Chunder Goopto* v. *Rajnarain Roy* (1), but I find that the question in that case was one of limitation, and the judgment affords no assistance in the solution of the question in the present case. .

"I must therefore hold on the construction of section 11 of the Regulation that the plaintiff in this case did not purchase the *taluk* free from the *mokurari* created by a former proprietor Radha Bullub Ghose."

The District Judge, then, after dealing with the question as to whether Radha Bullub was or was not a mere *benamidar* for the former proprietors, and holding that the plaintiffs had failed to prove that he was, and without going into any other questions raised in the appeal, reversed the decree of the lower Court and dismissed the suit with costs.

The plaintiffs then appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Karuna Sindhu Mukerjee* for the appellants.

Mr. *M. L. Sandel*, Moulvi *Mahomed Yusuff* and Moulvi *Sawajul Islam* for the respondents.

The appeal in the first instance came on for hearing before a Division Bench consisting of GHOSE and RAMPINI, JJ.

Dr. *Rash Behari Ghose*.—The second clause of section 11 of Regulation VIII of 1819 expressly applies to leases. In the present case what is sought to be avoided is a *mourosi-mokurari* lease. This clause declares that by a sale of a *putni taluk* for arrears of rent held under the Regulation "all leases originating with the holder of the former tenure stand cancelled. The words "holder of the former tenure" are not restricted to the actual defaulter, but are applicable to any previous holder of the *putni*.

The words "defaulting proprietor" and "defaulter" used in other parts of the section cannot be restricted to the holder of the *putni* who has fallen into arrears for the payment of the *putni* rent. The first clause of the section provides that the sale

(1) 10 W. R., 15 (*at* p. 19.)

1894

GOPEENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

shall be free of "all incumbrances that have accrued by the act of the defaulting proprietor." The latter part of the same clause assigns as the reason for declaring the sale to be free of all incumbrances to be "the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it, &c., &c." If only the incumbrance created by the actual defaulter could be avoided, it would not be possible for the zemindar to hold the tenure in the condition in which he created it.

Again, any incumbrance imposed by a former holder on the *putni*, if it be accepted and upheld by any purchaser of the *putni* at a sale under the Regulation, must be taken to be the latter's act. If he, the purchaser, were to default, and the *putni* were again brought to sale under the Regulation, the incumbrance accepted and upheld by the purchaser would be an incumbrance which was allowed to exist by the act of the defaulter, and the second purchaser at the second sale would get the *putni* free of the incumbrance, though it originally was imposed by a holder who preceded the last defaulter. The clause taken as a whole leaves no doubt as to the provisions of the law regarding the consequence attendant on a sale for arrears of rent under the Regulation.

The case of *Issen Chunder Kur* v. *Madhub Chunder Ghose* (1) referred to by the learned Judge cannot be treated as an authority for the proposition relied upon by the Judge. It is a very meagre report. Beyond this case there is not a single case on the subject in the Reports, and since the passing of the Regulation sales have been regularly held and no one ever questioned the effect of it.

Mr. *M. L. Sandel* for the respondents.—The words "defaulting proprietor" in the first clause of section 11 of the Regulation can mean no other than the holder of the *putni*, who has failed to pay rent, and against whom the proceedings have been taken under the Regulation. In this case the *mokurari* lease was not granted by the defaulter, but by a previous holder of the *putni*, from whom the defaulter did not derive title. The defaulter was a purchaser at a sale held for arrears of *putni* rent under the

(1) 1 Rev., Jud. and Police Journal, 1863, p. 109.

Regulation. He defaulted; there was a second sale under the Regulation at which plaintiff purchased. The *mokurari* lease was not created by the defaulter, and therefore is not void under the first clause. If the latter part of the first clause be taken to qualify the words "defaulting proprietor," in the earlier portion of it, the plaintiff can derive no benefit. The "indefeasible right, &c., &c.," in the latter part of the first clause, attaches to the zemindar and not the purchaser. The zemindar is not the plaintiff.

Again, if the present case falls within the second clause of section 11 of Regulation VIII of 1819, the words "holder of the former tenure" in the earlier part of the clause, and the word "defaulter" at the end of the clause, must be held applicable to the same person, so that, though the words "holder of the former tenure" by themselves may extend to any previous holder, by the word 'defaulter,' they are to be restricted to the holder for whose arrears the sale took place, and who, as regards the purchaser, would be a former holder." The case of *Issen Chunder Kur* v. *Madhub Chunder Ghose* (1) is a direct authority on the point.

There are other questions arising in the case which the Judge below has not decided, and which would have to be decided if his view of the law is held to be wrong.

Moulvi *Mahomed Yusuff*, on the same side.—In the other Acts which deal with a similar matter, *viz.*, section 37 of Act XI of 1859, section 16 of Bengal Act VIII of 1865, and section 66 of Bengal Act VIII of 1869, the language is very clear and precise and avoids all incumbrances and under-tenures created by the tenure-holder after the date of the creation of the tenure.

The following judgments were delivered by the Court :—

RAMPINI, J.—The plaintiffs are the purchasers of a *putni taluk* under Regulation VIII of 1819. They sue to annul a *mokurari* tenure, which was created, not by Radhica Singh and others, the defaulting *putnidars* for whose arrears the *putni* was sold, but by a former *putnidar*, one Radha Bullub Ghose. On the sale for the arrears of Radha Bullub Ghose under the Regulation, it was purchased by one Kalipersad, and he held possession for many years, but the *mokurari* was not interfered with and was allowed

(1) 1 Rev. Jud. & Police Journal, 1863, p. 109.

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

to remain. The question in this case is whether, that being so, the plaintiff can now set it aside.

The Sub-Judge before whom the case first came held that the *mokurari* could be set aside, but the District Judge before whom the case came on appeal held that, looking at the terms of section 11 of Regulation VIII of 1819, and the case of *Issen Chunder Kur* v. *Madhub Chunder Ghose* (1) the *mokurari* could not be set aside, and that it is only tenures created by the immediate defaulting *putnidar* that can be set aside by the purchasers of a *putni* sold for arrears of the *putni* rent. In coming to this conclusion, the District Judge has relied on the terms of clause 1, section 11 of Regulation VIII of 1819, and no doubt, according to the terms of this clause, he appears to be right. The latter part of this clause which says—"no transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure, except the charge or assignment should have been made with the condition to that effect under express authority obtained from such zemindar," may at first sight seem to qualify the first part of the clause. But in the case of *Issen Chunder Kur* v. *Madhub Chunder Ghose* (1) cited to this Court has expressed an opinion that this part of the section "refers to transactions in which the *putni* itself is dealt with in such a manner as to endanger the rights of the zemindar to his rent, and not to leases granted to under-tenants." If this view be correct, and I think it is, it is clear that it is only tenures created by the immediate defaulting *putnidar* that can be set aside by the zemindar when the *putni* is sold for arrears of the *putni* rent.

It is, however, not the zemindar that in this suit seeks to set aside the *mokurari* in question, but the purchasers of the *putni*, and the *mokurari* is not an incumbrance within the meaning of clause 1. The clause of section 11, Regulation VIII of 1819, which is applicable, is therefore not clause 1, as supposed by the lower Courts, but clause 2. But this clause is much to the same effect as clause 1.

(1) 1 Rev. Jud. & Police Journal, 1863, p. 109.

It says: "In like manner on sale of a *taluk* for arrears all leases originating with the holder of the former tenure, if creative of a middle interest between the resident cultivators and the late proprietor, must be considered to be cancelled, except the authority to grant them should have been specially transferred. The possessors of such interest must consequently lose the right to hold possession of the land and to collect the rent of the ryots; this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent." Under the terms of this clause then, it is only middle interests between the resident *cultivators* and *the late proprietor*, and which were enjoyed merely in consequence of the *defaulter's* assignment of certain portions of his own interest, which are to be considered as cancelled on a sale of a *putni taluk*. There is no provision to the effect that middle interests between the resident cultivators and any proprietor of the *putni*, other than the late proprietor, that is, apparently, the immediately preceding proprietor or *putnidar*, can be cancelled on a sale taking place.

The learned pleader for the respondent has called attention to the different wording of later Acts, such as section 37, Act XI of 1859, section 16, Bengal Act VIII of 1865, and section 66 of Bengal Act VIII of 1869. These sections all lay down either that on sales of estates or tenures for arrears the purchasers are entitled to cancel *all* incumbrances, or, more explicitly still, that they are entitled to cancel incumbrances created by *any* holder of the tenure. Hence, the learned pleader contends it is obvious that the terms of clauses 1 and 2 of section 11 of Regulation VIII of 1819 were intentionally worded as they are, so as to confine the annulment to tenures created only by the immediate defaulting *putnidars*. However this may be, it is clear that the terms of these clauses do so restrict the right of annulment. When the later Acts were framed this fact apparently was perceived, and the power of annulling under-tenures was enlarged. No modification of the terms of section 11 of Regulation VIII of 1819 was, however, made, and it must therefore, I think, be held that the strict interpretation put upon them by the learned District Judge in this case is the right one.

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

It is no doubt anomalous that if the *putni* were sold in execution of a decree for rent under any of the Acts to which we have just referred, the purchaser would have larger powers than a purchaser at a sale held under Regulation VIII of 1819. But this would appear to be the result of the way in which the more recent Acts have been framed, and what we have to do, I think, is to administer the law as we find it.

It has further been contended by the learned pleader for the appellant that the acceptance of rent by the defaulting *putnidar* from the *mokurariдar*. and his thus allowing the *mokurari* to remain, is an act creating a tenure which the purchaser is entitled to cancel or set aside. But the language of the law does not favour this view ; for it speaks of "all leases originating with the holder of the former tenure, if creative of a middle interest, &c.," and I do not think that the mere acceptance of rent without any formal act, confirmatory or creative of the tenure, can properly be held to operate as originating or creating a tenure which already exists.

Another contention raised by the appellant in this case is as to whether the former *putnidar* Radha Bullub was or was not a mere *benamidar* for the late proprietors. It is, however, not necessary to discuss this question at length. The District Judge has held that the plaintiffs have failed to prove that Radha Bullub was a *benamidar*, and this, being a finding of fact, is conclusive.

I would, therefore, dismiss the appeal with costs.

GHOSE, J.—The plaintiffs are the purchasers of a *putni taluk* at a sale held under the provisions of Regulation VIII of 1819. They sue to cancel a *mokurari* tenure granted by a former *putnidar*. The *putni* was created in 1226 B. S. (1819) ; and Radha Bullub, who was the *putnidar* in 1247 (1839), granted the *mokurari* in question to the defendants' predecessor. The *putni* was sold up under Regulation VIII of 1819 and purchased by one Gopi Mohun in 1255 (1848). This individual did not set aside the *mokurari*, as he was entitled to do, but allowed it to stand. The *putni* was resold for Gopi Mohun's default under the same Regulation in 1292 (1885) and purchased by the plaintiffs. The Court of first instance decreed the suit, but the District Judge, on appeal, has dismissed it, being of opinion that, upon a proper construction

of section 11 of the Regulation, the plaintiffs are not entitled to set aside the *mokurari*.

The main question which was raised in the Courts below, and which has also been raised before us, is, whether the plaintiffs are entitled to set aside the *mokurari*, it having not been granted by the *putnidar* for whose default the last sale in 1292 took place.

The section of Regulation VIII of 1819 which bears upon this question is section 11. The *first* clause of the section refers to incumbrances, the *second* to leases, creative of a middle interest, and the *third* clause to *khodkast* ryots. The first clause declares that the *taluk* when sold "is sold free of all incumbrances that may have accrued upon it by act of the defaulter, his representatives or assigns," and it provides: "No transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect, under express authority obtained from such zemindar."

The second clause says: "In like manner, on sale of a *taluk* for arrears, all leases originating with the holder of the former tenure if creative of a middle interest between the resident cultivators and the late proprietor must be considered to be cancelled, except the authority to grant them should have been specially transferred; the possessors of such interests must consequently lose the right to hold possession of the land, and to collect the rents of the ryots, this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent."

The *mokurari* lease which the plaintiffs seek to set aside is no doubt an incumbrance upon the *putni*, but inasmuch as the section distinguishes incumbrances by way of sale, gift, mortgage, or otherwise, from leases creative of an immediate interest, it (the *mokurari*) may not be regarded as an incumbrance within the meaning of clause 1, but a lease as falling within clause 2.

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

Referring in the first place to clause 1, it may no doubt be well argued that it is only in the event of an "incumbrance" being created by the *putnidar*, for whose default the sale takes place, and not by any previous *putnidar*, that the party claiming under the sale can seek to set it aside. But there may be two answers to this position—*first*, the incumbrance might not have been *created* by the *putnidar* for whose default the last sale took place; it may have *accrued upon it* by his act of omission in not setting it aside, though he was so entitled to do, but allowing it to stand; and in this view it may well be regarded as an incumbrance by himself; *second*, the zemindar, under the second part of the clause, is entitled to bring the *putni* to sale in the same condition in which it was created by him, unaffected in any way by incumbrances created by any of the *putnidars*, either the last, or any previous holder; and, therefore, if the *putni* is sold in the same condition in which it was originally created, it is obvious that the purchaser acquires the *putni* free from the said incumbrance. If, however, the bare words of the section were followed, regardless of the spirit and policy of the law, it might lead to this, that if an incumbrance be created by a *putnidar*, and he assigns the *putni* to another, and the latter commits default resulting in a sale of the *putni*, the purchaser would not be entitled to set aside the incumbrance, because the words are "by act of the defaulter, his representatives or assignees."

Passing on now to the *second* clause, we find that the words used in it are "all leases originating with the holder of the former tenure." The expression "holder of the former tenure" may, I think, well be applied to any of the *putnidars*, either the last or any previous holder, and I am not prepared to say that it should be limited to the immediate or last defaulter, though no doubt the last part of the section speaks of the "*defaulter's*" assignment of a certain portion of his own interest. If again the second portion of clause 1, to which I have already referred, applies to the case of a permanent lease, as an encumbrance, or if, at any rate, it explains the policy of the law on the subject, it would, I think, be right to say that the zemindar being entitled to bring the *putni taluk* to sale in the same condition in which it was at the time of its creation, the purchaser at the sale would be at liberty to cancel the said

lease, though it might have been granted by a former *putnidar*, and not by the last defaulter. And it seems to me that it would not be over-straining the language of the section if we were to say that the act of the last defaulter, in allowing the lease to stand, amounts in effect to the creation of it which the purchaser would be entitled to cancel. To hold otherwise would be to diminish in a great measure the security which it was the intention of the law to give to the zemindar. Take this case: A *putnidar* receives a very large *bonus* and creates a *dur-putni* or a *mokurari* of the lands of the *putni* at a very small rent; he commits default and the *putni* is sold; the purchaser at this sale does not either accept the under-tenure-holder as tenant, or take immediate steps to cancel the tenure, but allows the *putni* to be sold for arrears of the next *kist;* the result would probably be, if the opposite view be accepted, that the *putni* would be sold for a very small value to the detriment of the zemindar's claim, because nobody would offer a proper price, it being understood that the under-tenure could not be set aside. This is a state of things which I do not think could have been intended by the Legislature.

Our attention has been drawn by the learned vakil for the respondent to the wording of some of the subsequent sale laws as to tenures—Bengal Acts VIII of 1865 and VIII of 1869, where the words are (referring to incumbrances and leases which the purchaser is entitled to set aside) "act of any holder of the said tenure," "by any act of any holder of the tenure"—words which clearly include the act of any previous holder of the tenure. The language of the subsequent Acts would not explain the intention of the Legislature in 1819, but it may be observed that it would seem to be anomalous that in case of a sale of a *putni* tenure under any of these Acts the purchaser would be entitled to set aside the act of any previous holder of the *putni*, whereas if the *putni* is sold under Regulation VIII of 1819, he would not be so entitled.

The learned Judge of the Court below has relied upon a decision of this Court in 1863 in *Issen Chunder Kur* v. *Madhub Ghunder Ghose* (1), but the case is so meagrely reported that we cannot gather from it what the facts were: and it will be observed

(1) 1 Rev., Jud. & Police Journal, 1863, page 109.

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

that the learned Judges did not then consider the *second* clause, but, treating the lease as an incumbrance, confined their observations to the first clause of section 11.

For these reasons I am of opinion that the decree of the lower Appellate Court should be set aside, and the case sent back to the District Judge for the trial of the other questions raised before him.

In the view I have just expressed, I have the misfortune to differ from my learned colleague, and the case should therefore be referred to a third Judge.

The case was accordingly referred to BEVERLEY, J., under the provisions of section 575 of the Code of Civil Procedure and re-argued before him.

Dr. *Rash Behari Ghose* and Baboo *Karuna Sindhu Mukherjee* for the appellants.

Mr. *Abdul Rahim*, Moulvi *Mahomed Yusuf* and Moulvi *Serajul Islam* for the respondents.

The case was re-argued by Baboo *Karuna Sindhu Mookherjee* and Mr. *Abdul Rahim* on behalf of the respective parties.

The judgment of BEVERLEY, J., was as follows:—

This case has been referred to me under the proviso to section 575 of the Code of Civil Procedure in consequence of a difference of opinion on a point of law between the two Judges who heard the appeal.

The point of law is whether under Regulation VIII of 1819 the purchaser of a *putni* at a sale under that Regulation can avoid a *mokurari* which was not created by the *putnidar* for whose default the sale was held, but by a former *putnidar*.

It seems that the *putni* in this case was created in 1819, the *mokurari* was granted by the then *putnidar* in 1839. In 1848 the *putni* was sold for arrears of rent under the Regulation, but the *mokurari* was not avoided at that time. In 1885 the *putni* was again sold under the Regulation, and in 1890 the purchaser brought the present suit to avoid the *mokurari*. Mr. Justice Rampini, relying on the strict wording of section 11 of the Regulation, and on a decision of this Court in the case of *Issen Chunder Kur* v. *Madhub Chunder Ghose* (1) is of opinion that

(1) 1 Rev., Jud., and Police Journal, 1863, p. 109.

the plaintiff cannot avoid the *mokurari*, inasmuch as it was not created by the *putnidar*, for whose default the sale was held at which the plaintiff purchased.

Mr. Justice Ghose, on the other hand, is of opinion that, having regard to the policy and to the principle of the Regulation, the zemindar is entitled to bring the *putni* to sale in the same condition in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors.

I am of opinion that Mr. Justice Ghose's view of the law is correct.

The policy of the Regulation in this matter appears to me to be clear from a consideration of section 3, clause 2 ; of section 11, clauses 1 and 2 ; of section 12 ; of section 13 ; and of section 15, clause 2. From these sections I think it is obvious that the intention of the Legislature was that a sale under the Regulation should pass the entire rights and privileges attaching to the *putni* in the state in which it was originally created.

The preamble to the Regulation contains the following clause : "It has accordingly been deemed necessary to regulate and define the nature of the property given and acquired on the creation of a *putni taluk* as above described, also to declare the legality of the practice of under-letting in the manner in which it has been exercised by *putnidars* and others, establishing at the same time such provisions as have appeared calculated to protect the under-lessee from any collusion of his immediate superior with the zemindar or other for his ruin, as well as to secure the just rights of the zemindar on the sale of any tenure under the stipulations of the original engagements entered into with him."

By section 3 of the Regulation, *putni talukdars* are declared to possess the right of letting out the lands composing their *taluks* in any manner they may deem most conducive to their interest, and any such engagements are declared to be legal and binding between the parties to the same, their heirs and assignees : "Provided however that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

tenure answerable for any arrears of his rent, *in the state in which he granted it and free of all incumbrance resulting from the act of his tenant*"

Section 11, clause 1, declares that a *taluk* sold under the rules of the Regulation for arrears of rent is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, and these words are emphasized by the addition of the following clause: "No transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible *right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent* which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zemindar."

Clause 2 of that section similarly declares that on the occasion of a sale of the *putni* for arrears all leases originating with the *putnidar* and creative of a middle interest between the resident cultivators and the late proprietor must be considered to be cancelled. "The possessors of such interests must consequently lose the right to hold possession of the land and to collect the rents of the ryots, this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, *the whole of which was liable for the rent.*"

Section 12 limits the rule for the fall of under-tenures to the case of a sale of the *putni* for arrears, and declares that it does not apply to any private transfer by a *talukdar* of his own interest, nor to a public sale in execution of a decree, nor to the case of a relinquishment by the *talukdar* in favour of the zemindar, nor to any act originating with the former holder, other than default as aforesaid; all such operations involve *only a transfer of the tenure in the state in which it may be held at the time*, and the new incumbent succeeds to no more than the reserved rights of the former tenant, such as they may be, and is of course subject to any restriction put upon the tenure by his act.

Section 13 lays down rules under which under-tenants may stay the sale, and so "*save their tenures from the ruin that must attend such a sale.*"

Section 15 of the Regulation prescribes rules for putting the purchaser in possession, and clause 2 deals with the case of opposition on the part of the late incumbent, or the holders of tenures or assignments derived from him. In such case a proclamation may be issued by the Civil Court, declaring that "the new incumbent having by purchase at a sale for arrears of rent due to the zemindar *acquired the entire rights and privileges attaching to the tenure of the late talukdar in the state in which it was originally derived by him from the zemindar*," he alone will be recognized as entitled to make the zemindari collections.

In section 11, clause 1, the *putni* is declared to be "sold free of all incumbrances that may have accrued upon it by act of the *defaulting proprietor, his representatives or assigns.*" Mr. Justice Rampini relies on these words as showing that it is only incumbrances created by the actual defaulter that can be avoided, but it seems to me, having regard to the general purport of the Regulation as set out above, that by the words "defaulting proprietor" is meant the proprietor of the tenure in default, and that the words were not intended to be restricted to the particular proprietor for whose default the tenure was brought to sale. In truth, I am of opinion that the words were intended to bear the same meaning as was more fully and accurately expressed in section 52 of Act XI of 1859, by which the purchaser of an estate, not permanently settled, sold for arrears of revenue, was declared entitled to avoid and annul all tenures which may have originated with "*the defaulter or his predecessors being representatives or assigns of the original engager.*"

Similarly in clause 2 of section 11 of the Regulation, I am inclined to think that we must give a wide interpretation to the word "defaulter," so as to include his predecessors being representatives or assigns of the original *putnidar*.

The words "late *talukdar*" in section 15 must obviously be similarly construed.

As regards the decision of this Court upon which the Judge of the lower Appellate Court and Mr. Justice Rampini rely, it appears that upon an application for review of judgment the view of the law taken therein was over-ruled. A copy of the

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

judgment on review is annexed to this judgment,* and that case, therefore, so far from being an authority in favour of the respondents in this case, is a direct authority against them.

* SPECIAL APPEAL No. 554 of 1863.

The judgment of the Court on the review was as follows:—This was a suit by a *putnidar* against a tenant on his estate for enhancement of rent. The tenant alleged that he was not liable to enhancement, as he held the land at fixed rates which had not been changed from the Permanent Settlement. The Collector dismissed the claim, finding that the tenant had paid a fixed rate for twenty years and presuming from such payment that he had paid at a fixed rate from the Permanent Settlement. On appeal the Judge also dismissed plaintiff's claim, but on another ground, *viz.*, that the tenant held under a genuine *istemrari-mokurari pottah* of the year 1217.

A special appeal was preferred to this Court. The ground taken was that the *pottah* alluded to by the Judge had been granted by a former *putnidar*, who had defaulted, and whose *putni* was sold for arrears of rent, and after several such defaults and sales had finally come into the possession of the plaintiff by public sale; that under section 11, Regulation VIII of 1819, the plaintiff purchased his *putni* free of all incumbrances, and in the same condition in which that *putni* was created originally by the zemindar; that the tenant's *pottah* having been granted by a former *putnidar* was null and void as against the present *putnidar*, the plaintiff; and that the Judge was consequently in error in holding that the tenant's *pottah* barred the plaintiff's claim for enhancement.

The Court over-ruled this plea, declaring that under the wording of section 11, Regulation VIII of 1819, a *putnidar* was empowered to cancel all incumbrances created by the defaulting proprietor only.

A review has been since admitted to reconsider this question.

Mr. Doyne, Counsel for appellant, has argued that the effect of the law laid down by the Court will be to jeopardize the property of all *putnidars*; that although the wording of section 11, Regulation VIII of 1819, may bear out the ruling which the Court previously arrived at, still that ruling is in direct opposition to the principle of the law as laid down both in the preamble and in the body of the Regulation, under which the right of the zemindar to hold the *putni* tenure answerable for any arrear of his rent in which he granted it and free of all incumbrances resulting from the act of the *putnidar* was distinctly and frequently declared; that upon this principle the provisions of section 11 of the Regulation laid down that any *putni* tenure sold for arrears of rent is sold free of all incumbrances of sale, gift or otherwise; and that all leases originating with the holder of the former tenure were *ipso facto* cancelled with the special exceptions contained in the concluding clause in favour of *khodkhast* ryots and resi-

For these reasons I agree with the view of the law taken by Mr. Justice Ghose.

The decree of the lower Appellate Court is accordingly set

dent and hereditary cultivators. Mr. Doyne argued that the *pottah* put forward in this suit having been admitted by a former *putnidar* was consequently void from the circumstance of that *putnidar* having defaulted, and a sale having taken place for arrears of rent due on the *putni*.

The vakil for respondent, on the other hand, relied on the wording of the law which he stated was clear and unmistakeable, and which alluded only to such incumbrances as had been created by the defaulting proprietor, his representatives and assigns, and to such leases as had been created by the holder of the former tenure, as void. He contended that this could not be held to apply to any but the last defaulting *putnidar*.

After giving the subject our fullest consideration we are of opinion that, even under the wording of the law, the defendant's *pottah*, if an incumbrance or a lease not coming within the exceptions of clause 3, section 11, Regulation VIII of 1819, is not binding on the plaintiff. The law states that a *putni taluk* sold for arrears of rent is sold free of all incumbrances and leases to middlemen made by the defaulting proprietor. When the *putnidar* who, it is said, granted the defendant his lease defaulted and his *putni* was sold, that lease became then and there null and void. The new *putnidar* might recognize it, might receive rent under its terms, but it was under the law cancelled and remained cancelled until such time as the new *putnidar* renewed it or recognized it as good against him. Similarly as each succeeding *putnidar* defaulted—and in this case there appears to have been many such defaulting *putnidars* between the giver of the defendants' lease and the present plaintiff—the leases given by each *putnidar*, whether they were new leases or mere recognition of old leases, all fell to the ground when the last sale took place. An argument may be raised against this view of the law on the mere wording of the provisions of section 11 of the Regulation, but when the wording is taken into consideration with the principles so frequently laid down in that law (see sections 3 and 11), and upon which all incumbrances and leases are declared void, we think there can be no doubt that the effect of the law is at once to void all such incumbrances and leases upon a sale taking place, and that this effect is consequently applicable to the acts, not only of the last defaulting proprietor, but also of all previous defaulting proprietors. We therefore set aside the view of the law taken on the former hearing of this appeal.

But admitting that the *pottah* put forward by defendant is void, if it is a lease granted by a former defaulting *putnidar* to a tenant who is not a *khodkhast* ryot or a resident and hereditary cultivator and not at a fair rent when it was granted, it is still contended for the defendant that it is not such a lease, but that it is a *pottah* confirming an ancestral *istemrari-*

1894

GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN.

aside, and the case will be sent back to that Court for the trial of the other questions raised in appeal.

The appellants are entitled to the costs of this appeal.

Appeal allowed and case remanded.

H. T. H.

mokurari lease which the defendant and his ancestors had held at fixed rates from the Permanent Settlement, and which they have similarly held at the same fixed rate from the date of the *pottah* to the present day. We have examined the terms of the *pottah*, and we find that the statement of the defendant is correct. The *pottah* is not a new lease created by the *putnidar* who gave it. The *pottah* bears evidence that the lease had been then in existence for at least one generation; that it was in 1217 an ancestral perpetual lease at a fixed rate of rent; and that the former *putnidar* did not create it, but merely confirmed it. The plaintiff cannot void his lease under Regulation VIII of 1819, unless it is shown to have been created by a former *putnidar*. In the absence of any proof to that effect the provisions of Act X of 1859 will apply, and the *pottah* is itself convincing evidence that for more than fifty years the defendant and his ancestors have held this land at a fixed rate of rent. The plaintiff's claim to enhance rent cannot therefore be admitted. The Judge was right in dismissing the appeal made to him. We also dismiss the plaintiff's appeal with all costs and interest.

(Sd.) W. S. SETON KARR.
(Sd.) E. JACKSON.

31st August 1864.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1894 *April* 2.

NOBIN CHAND NUSKAR (PLAINTIFF) *v.* BANSENATH PARAMANICK (DEFENDANT.)*

Bengal Tenancy Act, 1885, sections 3 clause 5, 65, 161—Sale of tenure for arrears of road cess under decree—"Rent"—Road Cess—Cesses—Incumbrance by defaulting tenant, Effect of sale in execution of decree for road cess on.

The word "rent" in section 65 of the Bengal Tenancy Act, 1885, includes road cess payable by the landlord.

A tenure-holder granted a usufructuary mortgage of certain lands within his tenure to *A*, and directed the tenants to pay their rents to him. Subsequently the superior landlord brought a suit for road cess against the tenure-holder, and in execution of his decree sold the tenure under section

* Appeal under section 15 of the Letters Patent No. 29 of 1893 against the decree of the Hon'ble Robert Fulton Rampini, one of the Judges of this Court, dated 31st July 1893, in appeal from Appellate Decree No. 1701 of 1892.

65 of the Bengal Tenancy Act. *A* then brought a suit against one of the tenants for arrears of rent, and contended that all that passed under the auction sale was the right, title and interest of the tenure-holder, and that his rights under the mortgage were unaffected by the sale, and that he was still entitled to the rent.

Held that Chap. XIV of the Bengal Tenancy Act must be read with section 65 of the Act, and that, having regard to the definition in clause 5 of section 3, "rent," as used in that section, includes road cess payable by the tenant, and that the sale was a sale of the tenure, the purchaser acquiring the property free from the incumbrance created by the tenure-holder in favor of *A*, it not being a registered and notified incumbrance within the meaning of section 161 of the Act.

THIS was an appeal under section 15 of the Letters Patent against a decree of Mr. Justice Rampini, dismissing an appeal from a decree of the additional Subordinate Judge of the 24-Pergunnas, which modified the original decree passed in the suit by the additional Munsif of Diamond Harbour.

The suit was instituted by the plaintiff to recover arrears of rent in respect of certain lands, of which, along with others, he alleged that he had taken a usufructuary mortgage from one Tripura Sundary Dabi, who admittedly held a tenure of the lands. It appeared from the pleadings and evidence in the suit that the defendant had executed a *kabuliat* in favor of Tripura Sundary on the 24th Magh 1290 (6th February 1884), in respect of 3 *bighas* 19 *cottahs* and 15 *chittacks* of land at an annual *jama* of Rs. 17; that on the same day Tripura Sundary executed a mortgage in favour of the plaintiff for these lands and others amounting in all to some 14 *bighas* and odd, and directed the tenants to pay rent to the plaintiff; that the plaintiff had realized rent from the defendant up to 1294 (April 1888), but the latter had not paid him any since. The plaintiff sued for rent at the above-mentioned rate for the period from 1295 to Pous 1297 with cesses and damages aggregating the sum of Rs. 60.

The defendant admitted the execution of the *kabuliat* in favor of Tripura Sundary, but stated that out of the lands held by him the portion situate in *mouzah* Kalikar, consisting of 2 *bighas* 12 *cottahs* and 7 *chittacks*, had been sold in execution of a decree for rent obtained by the zemindar against Tripura Sundary and purchased by one Noyan Chand Haldar, who had since been realizing the rent in respect thereof from him, and that as regarded the

1894

NOBIN CHAND NUSKAR v. BANSENATH PARAMANICK.

remaining 1 *bigha* 17 *cottahs* and 8 *chittacks* which was situate in other villages he still held possession thereof under Tripura Sundary and was paying her rent, for he had no notice of the alleged mortgage.

The evidence in the case showed that Tripura Sundary held a tenure in Kalika including the 2 *bighas* 12 *cottahs* 7 *chittacks* under the zemindar Peary Mohun Roy, who obtained a decree for road cess against her, and in execution of that decree caused the tenure to be sold at auction in 1888. Noyan Chand Haldar became the purchaser, and having obtained the sale certificate got possession of the land, including the 2 *bighas* 12 *cottahs* and 7 *chittacks*, covered by the defendant's *kabuliat*, through the Court, and after having obtained such possession he took a *kabuliat* from the defendant in respect of that portion. Evidence was given in the suit that the defendant had paid rent to the auction-purchaser for the period in suit, in respect of the land purchased by him, and had paid rent to Tripura Sundary after the date of the mortgage in respect of all the land he held down to the date of the auction purchase, and after that date in respect of the balance of the land covered by the *kabuliat*, but the evidence as to the payment to Tripura Sundary was disbelieved by the Munsif, who also did not consider that the payment to Noyan Chand Haldar was satisfactorily proved.

The Munsif held that the auction-purchaser, by virtue of his purchase, only acquired the right, title and interest of the judgment-debtor, or, in other words, the equity of redemption of Tripura Sundary, and that the defendant was bound to pay rent for the whole of the land held by him to the plaintiff, at any rate until the auction-purchaser established his claim against the plaintiff by regular suit. He accordingly decreed the claim in full.

The Subordinate Judge found that the payment of rent by the defendant to the auction-purchaser was proved, and that the decree for road cess had the same effect as a decree for rent; and that, therefore, the defendant was absolved from paying any further rent to the plaintiff in respect of those lands after the auction sale. He accordingly varied the decree of the lower Court, holding the defendant only liable to the plaintiff in respect of the 1 *bigha* 7½ *cottahs* and dismissing the plaintiff's suit in respect of the remainder of his claim.

The plaintiff then appealed to the High Court, and the appeal was heard by Mr. Justice RAMPINI who delivered the following judgment :—

"This is a suit for arrears of rent.

"A preliminary objection has been urged that, under the provisions of section 153 of the Bengal Tenancy Act, no second appeal lies in this case, inasmuch as the amount claimed in suit does not exceed Rs. 100. It appears to me, however, that a second appeal does lie in this case, inasmuch as the question of the amount of rent annually payable by the tenant has been decided in it. The plaintiff claimed under a usufructuary mortgage to be entitled to the full rent of the tenure, namely, Rs. 17 per annum. The Subordinate Judge has held that he is not entitled to this amount, but to a less amount, inasmuch as a part of the tenure has been sold in execution of a decree for road cess, and has passed into the hands of a third party, named Noyan Chand Haldar. Therefore it would appear that in accordance with the ruling in *Aubhoy Churn Maji* v. *Shoshi Bhusan Bose* (1), approved of by a Full Bench decision in *Narain Mahton* v. *Manofi Pattuk* (2), a second appeal will lie, because the question of the amount of rent annually payable by the tenant has been decided.

"Now, the learned pleader for the appellant contends that the decision of the Subordinate Judge is wrong on this ground, that he has held that the tenure has been sold in execution of a decree for arrears of road cess ; and it has been contended on the strength of the ruling in *Shekaat Hosain* v *Sasi Kar* (3) that a decree for road cess is a personal decree, and that in execution of such a decree only the right, title and interest of the judgment debtor can be sold, and that the whole tenure will not pass in execution of such a decree. The learned pleader for the respondent, however, refers to the definition of rent in section 3, clause 5, of the Bengal Tenancy Act, and points out that, according to this definition, the word 'rent' includes road cess in sections 53 to 68 ; and he says that the tenure of the defendant in this case has been sold under the provisions of section 65 of the Bengal Tenancy Act,

(1) I. L. R., 16 Calc., 155. (2) I. L. R., 17 Calc., 489.
(3) I. L R., 19 Calc., 783.

1894

NOBIN CHAND NUSKAR v. BANSENATH PARAMANICK.

and that therefore the tenure passed in execution of that decree; and further he refers to the sale certificate given to the purchaser at that sale, which certifies that the tenure passed, and not the right, title and interest of the judgment-debtor only.

"I think that this contention of the learned pleader for the respondent is correct, and that the sale in this case took place under the provisions of section 65 of the Bengal Tenancy Act; and there can be no doubt that under the provisions of that section and section 3, clause 5 of the Act, road cess is included within the definition of 'rent,' and that the sale having taken place in execution of a decree for road cess or rent, the whole tenure must be held to have passed.

"I therefore see no reason for disturbing the finding of the lower Appellate Court, and I dismiss the appeal with costs."

The plaintiff preferred this appeal under the Letters Patent.

Baboo *Nilmadhub Bose* and Baboo *Jadub Chunder Seal* for the appellant.

Baboo *Ashutosh Mookerjee* for the respondent.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

GHOSE, J. (PETHERAM, C. J., concurring).—We are of opinion that Mr. Justice Rampini is right in the conclusion which he has arrived at.

Chapter XIV of the Bengal Tenancy Act must, we think, be read with section 65 of the Act; and the word "rent" as used in that section includes, by reason of the definition given in clause 5 of section 3, road cess payable to the landlord by the tenant. That being so, the sale in execution of the decree obtained by the landlord for cess was a sale of the tenure under Chapter XIV, and the purchaser at that sale acquired the property free from the incumbrance created by the former tenant in favour of the plaintiff, it not being a registered and notified incumbrance within the meaning of section 161 of the Act.

As regards the question discussed before us, that no notice was served upon the plaintiff so as to avoid the incumbrance in question, it was not raised in either of the lower Courts. We

cannot assume, in the absence of facts, that no notice was given to the plaintiff. If the question had been raised, the defendant might have been able to show that such a notice was served on the plaintiff.

The appeal will be dismissed with costs.

Appeal dismissed.

1894

NOBIN CHAND NUSKAR *v.* BANSENATH PARAMANICK.

H. T. H.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BATHOO LAL AND ANOTHER (PETITIONERS) *v.* DOMI LAL AND ANOTHER (OPPOSITE PARTY.)*

1894 *June 5.*

Criminal Procedure Code (Act X of 1882), section 147—Disputes concerning Easement—Procedure to be observed by Magistrate when dispute exists regarding an Easement—Parties entitled to notice.

The enquiry contemplated under section 147 of the Code of Criminal Procedure is a judicial enquiry, and the opinion formed by a Magistrate must be a judicial one based on evidence legally recorded by him in the manner provided by section 356, and on due notice to the persons who respectively claim or deny the right, the subject of the dispute. Notice to servants of such persons is not equivalent to notice to them, and in such cases actual notice should be given to all the persons claiming or denying the right and interested in the subject-matter of the enquiry.

Magistrates should not institute proceedings under section 147 unless they are satisfied that a real danger of the evil, for the prevention of which the procedure was devised, does in fact exist. Such enquiries may lead to injustice being done from defective procedure, and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated enquiry and the presence of a large number of people, when the remedy of binding down a few persons to keep the peace, is ready to his hand.

THIS was an application to have an order passed by the Deputy Magistrate of Monghyr set aside. The order was passed under section 147 of the Code of Criminal Procedure, and directed that the Durbangha Raj, as represented by the petitioner Domi Lal, should repair a certain road or track which was alleged to exist through the lands belonging to the Baneli Raj and delineated on a plan exhibited in the proceedings, and that the carts belonging to the Durbangha Raj and others should be allowed to pass along the track when made.

* Criminal Revision No. 213 of 1894, against the order passed by Abdus Salam, Deputy Magistrate of Monghyr, dated the 17th of April 1894.

1894

BATHOO LAL v. DOMI LAL.

The facts of the case and the arguments of Counsel are sufficiently stated for the purpose of this report in the judgment of the Chief Justice.

Mr. *W. C. Bonnerjee*, Moulvi *Mahomed Yusuff* and Baboo *Tarak Nath Palit* for the petitioner.

Mr. *Jackson* and Baboo *Ram Charan Mitter* for the opposite party.

The following judgments were delivered by the High Court (PETHERAM, C.J., and RAMPINI, J.):—

PETHERAM, C.J.—On the 9th of March 1894, Domi Lal, the complainant in this case, made a statement on affirmation, before the District Magistrate of Monghyr, in which he stated that the Baneli Raj people had closed a path or road by which jungle produce, wood, &c., were brought from the Sakaul and Gorega jungles to the railway and Singhia. That he had been sub-inspector of jungles for twelve or thirteen years, and had seen the road used each year, but this year it had been closed, as there were disputes between the Raj Baneli and Raj Durbangha. He also said that this year, when the road was being made, the Baneli people obstructed; that five persons, whose names he mentions, came with *lathies*, and said that they would not allow him to make the road; that they were ready to commit assault if necessary; and that when he had ascertained that, he came away. He added that the Sakaul and Gorega jungles entirely belong to Durbangha. Upon this the District Magistrate, on the same day, made an order, in which he recited that the matter had come to his notice before, as it had been mentioned to him by Mr. Ambler and Mr. Bell, and that as both parties were powerful he thought there was likely to be a collision if the matter were not settled. He then goes on to direct that a notice should be issued to Gobind Pershad, Tehsildar at Dharhara Cutcherry, and Bhattu Lal Patwari, calling on them to show cause why the carts of Durbangha should not be allowed to come out from the Sakaul and Gorega jungles towards the railway and Singhia through Khajuria Pazungunge, and that if they alleged that Durbangha carts had no right of way, they would adduce evidence on the point, and the petitioner would also adduce evidence; he also directed that the case should be made

over to the Joint Magistrate. The next day the Joint Magistrate fixed the 26th instant, and directed that notice should issue according to the order, and that a copy of the complaint should go to the defendants. On the 23rd the District Magistrate transferred the case to the file of Moulvi Abdus Salam, a Deputy Magistrate of the first class, and fixed the 9th of April for the enquiry. The enquiry was commenced on that day, the evidence was completed on the 14th, and on the 17th the Deputy Magistrate delivered judgment, by which he ordered under section 147, Criminal Procedure Code, that the Durbangha Raj, represented by Domi Lal, do repair the tracks marked A1 to A1, and that Durbangha and other carts should be allowed to pass along this cart track when made. This rule was afterwards obtained by Mr. Bonnerjee from a Division Bench of this Court, and it has now been argued before us by Mr. Bonnerjee for the Baneli Raj, and by Mr. Jackson for the Maharajah of Durbangha. Mr. Jackson has placed the evidence before us and has argued that the decision of the Deputy Magistrate is right on the merits, and that the provisions of the section have been sufficiently complied with. Mr. Bonnerjee has contended that the original order of the District Magistrate is bad, because it does not state the grounds upon which he was satisfied that a dispute likely to cause a breach of the peace existed ; that even if it were not necessary for him to state such reasons under the provisions of section 147, still he must be satisfied of the fact for some sufficient reason ; and that the materials which were before him, and are now before us, were not such as he should have acted upon under the section : and, further, that if the materials for taking action were sufficient, the enquiry which was held was held without notice to the persons interested in the subject-matter of it, and whose rights are sought to be affected by its result ; and that that being the case, there has been no enquiry at all within the meaning of the law, and that the order of the Deputy Magistrate must be set aside, as it rests on no legal enquiry or conclusion. Mr. Bonnerjee has also attacked the finding on the merits.

In my opinion the persons who were necessary parties to this enquiry were not before the Deputy Magistrate whilst it was in progress, not because they did not choose to attend it, but because they had no notice of it, and that I think renders the whole pro-

1894

BATHOO LAL
v.
DOMI LAL.

ceeding abortive, and we must set it, and the order which is based upon it, entirely aside. The order which a Magistrate is empowered to make under section 147 is to be an order founded on an opinion to be formed by him that the right claimed, and disputed, does or does not exist, and that opinion must be the result of an enquiry which he has held for the purpose of ascertaining the facts, and at which the evidence has been recorded in the manner prescribed by section 356 of the Code, and it is to be valid until the person who claims to do the thing, or the person who objects to its being done, obtains the decision of a Civil Court on the question. There can be no doubt that the enquiry contemplated is a judicial enquiry, and that the opinion to be formed must be a judicial one, formed upon evidence legally before the Magistrate, and it is not necessary to add that the evidence before him would not be legally before him if it had been taken behind the backs of the persons who claimed or denied the right in the sense that they not only were not represented at the enquiry but had no notice of it. In the present case the persons who had notice of the enquiry were Gobind Pershad and Bhattu Lal, who were required by the notice which was served upon them to show cause why an order should not be made. These persons are said to be servants of the owners of the Baneli Raj, and I understand the Magistrate's view to be that they sufficiently represented the Raj, for service of such a notice upon them to be equivalent to service on the owners themselves, and that they sufficiently represented their masters at the enquiry itself. I cannot agree with such a view. There is no provision in the law which authorizes it in any way, and it would, in my opinion, be dangerous to the last degree to allow enquiries of this kind, in which the rights of people to their property may be at all events prejudiced, to be held without the persons interested having actual notice of them, and if it were the case here that the only persons interested in the result of this enquiry were the owners of the two Raj estates, I should think the enquiry and the decision bad and invalid, because those persons were not properly brought before the Court; but in the present case this is by no means all. The evidence on this record shows that the right claimed is the right to make and maintain, during a great portion of the year, a cart track for a mile and a half across

lands which are in the possession of a number of persons as ryots under the owners of the Baneli Raj, and that these persons, as well as their landlords, object to the land being used for this purpose, and deny that the alleged right exists ; so that, even if the owners of the two estates had been properly before the tribunal, the persons in actual occupation of the land, and who are the persons whose property would, or at least might, be injured by the exercise of the right claimed, are ignored altogether. For these reasons I am of opinion that the inquisition and order founded upon it must be set aside, the necessary parties not having been before the Court. This is sufficient to make the rule absolute, and it is not necessary for me to express any opinion on the other points raised, and on the question whether the order by which a Magistrate directs an enquiry under section 147 must state the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists, and on the merits of the dispute as to the right claimed I do not propose to say anything ; but on the question whether the deposition of Domi Lal, which was all that the District Magistrate had before him on the 9th of March, was material on which he could reasonably come to that conclusion, I have very grave doubts. Domi Lall does not say there was any danger of a fight ; he only says there would have been one if he had not given way, but he says he did give way, and does not intimate that he has any intention of taking any further step to enforce the alleged right. I think that Magistrates ought not to embark on enquiries of this kind, in which it is certain that injustice may be done from defective procedure, unless they are satisfied that a real danger of the evil, for the prevention of which this procedure was devised, does in fact exist, and that they would be wise not to use this procedure in such a case as the present, when it must involve a long and complicated enquiry, and the presence of a great number of people, when such an obvious remedy as binding down the five persons who are said to have threatened Domi Lall and his labourers was ready to his hand.

The rule will be made absolute to set aside all the proceedings.

RAMPINI, J.—I agree.

Rule made absolute and proceedings quashed.

H. T. H.

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep and Mr. Justice Trevelyan.

1894
March 16.

THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT) *v.* PREM LALL MULLICK AND OTHERS (PLAINTIFFS.)*

Administrator-General's Act (II of 1874), section 31—Transfer to Administrator-General by Hindu executor—Hindu Wills Act (XXI of 1870), section 5—Succession Act (X of 1865), sections 179, 187, 191—Probate and Administration Act (V of 1881)—Objects and Reasons for Act and Report of Select Committee on Bill.

N. L. M., a Hindu, died on the 22nd February 1891, leaving property in Calcutta and leaving a will, dated 5th August 1889. The executors appointed by the will took out probate on the 17th March 1891, and on the 14th August 1893 executed a deed, by which they purported, under section 31 of the Administrator-General's Act II of 1874, to transfer all estates, effects and interests vested in them to the Administrator-General of Bengal. *Held* by PRINSEP and TREVELYAN, JJ., affirming the decision of SALE, J. (PETHERAM, C.J., dissenting) that the transfer was not a valid one. The executor of a Hindu testator has no power to transfer the property of the testator to the Administrator-General under the terms of section 31 of Act II of 1874. That section applies only to the executors and administrators of persons of the class mentioned in section 16 of the Act, that is to say, persons not being Hindus, Mahomedans, or Buddhists.

Per PETHERAM, C.J., *contra.*—The transfer was a valid one. Even if section 5 of the Hindu Wills Act XXI of 1870 were sufficient to prevent such transfer to the Administrator-General under section 30 of the Administrator-General's Act of 1867, which is by no means certain, a Hindu executor has power, if not since the passing of the Hindu Wills Act, at any rate since the coming into force of the Probate and Administration Act (V of 1881), to transfer his interest and estate under a will to the Administrator-General, as constituted under Act II of 1874.

The course of legislation with reference to the creation of the office of the Administrator-General of Bengal, and to his duties and powers reviewed and considered in construing Act II of 1874. The history of the passing of an Act, and the intention of the Legislature in introducing it, though not admissible in England to explain a Statute, have been in this country taken into consideration in construing Acts of the Legislature.

Per PRINSEP, J.—The objects and reasons given by the Legislature on the introduction of a Bill, and the Report of the Select Committee on it, may be

* Original Civil Appeal No. 2 of 1894 from an order of Mr. Justice Sale, dated 21st December 1893, in Suit No. 596 of 1893

referred to in construing any Act to show the intention of the Legislature in passing it. *Queen-Empress* v. *Kartick Chunder Das* (1) referred to.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* PREM LALL MULLICK.

THIS appeal arose out of an application made on notice by the petitioner Prem Lall Mullick for an order that the defendant, the Administrator-General, might be restrained from selling or disposing of the furniture of the Seven Tanks Garden belonging to the estate of Nundo Lall Mullick, deceased, then advertized for sale, and for an order that a Receiver might be appointed.

The facts of the case were as follows: Nundo Lall Mullick, the testator, died on the 22nd November 1891, leaving a will, dated the 5th August 1889, by which he appointed the defendants Sumbhu Nath Roy and Dwarka Nath Bunjo, the executors, and trustees of certain trusts, religious and otherwise. The executors obtained probate of this will on the 17th March 1892, and entered into possession of the property of the testator. On the 14th August 1893, the executors, by a transfer deed, purporting to be executed by them under section 31 of the Administrator-General's Act of 1874, assigned and transferred the estate vested in them as executors to the defendant, the Administrator-General of Bengal.

On the 6th September 1893 the present suit (in which the application above-mentioned was made) was instituted by the adopted son of Nundo Lall Mullick, in which he asked for the administration of the estate of Nundo Lall Mullick, for the removal of the executors from the position of trustees of the estate, and for an injunction against the Administrator-General restraining him from taking possession of and dealing with the estate, and for a scheme to be framed for the purpose of carrying out the trusts of the will. Shortly after the filing of this suit, the properties, the subject-matter of the present application, were advertized for sale by the Administrator-General, and thereupon notice of the present application was given.

The matter came on for hearing before SALE, J., it being contended on behalf of the plaintiff that the deed of transfer under which the Administrator-General professed to act as transferee of the estate was not such a deed as was contemplated by section 31 of Act II of 1874, and that it was not

(1) I. L. R., 14 Calc., 721

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

authorized by the provisions of that section; the question as to the appointment of a Receiver being reserved.

On the 21st December 1893 the following order was made by SALE, J., who after stating the facts continued :—

Section 31 of Act II of 1874 is in terms the same as section 30 of Act XXIV of 1867, which is the immediately preceding Act dealing with the office of Administrator-General. There is no question that when the latter Act was passed section 30 of that Act did not apply to the case of Hindu executors. They did not come within the words "any private executor" used in that section, nor had they the right of transfer mentioned therein. It is not disputed that the course of decisions in this Court shows that up to the passing of the Hindu Wills Act the estates of Hindu testators did not vest in their executors. Having no estates vested in them to transfer they were necessarily excluded from the operation of section 30.

The question is—did this state of things continue until the passing of the later Act II of 1874.

In 1870 the Hindu Wills Act was passed. The effect of that Act was to extend the operation of section 179 of the Succession Act to the estates of Hindu testators, and thereby to vest Hindu estates in the executors. This, it is said on behalf of the Administrator-General, placed the executors of Hindu testators in the same position as those of testators whose wills are not exempted from the operation of the Succession Act, and gave them the right of transfer under section 30 of Act XXIV of 1867, which right was intended to be continued, and has in fact been continued, by the corresponding section of Act II of 1874.

The question as to the intention of the Legislature may, I think, be put in this form: Was it intended by the operation of section 31 of the Administrator-General's Act to enable the Administrator-General to administer the estates of Hindu testators in those cases in which the executors were willing to transfer, and the Administrator-General was willing to accept, the burden of administration? If so, then by the machinery of transfers created by that section, the Administrator-General may become clothed with rights and duties in respect of the estates of Hindus of a far

wider and larger character than those conferred upon him by sections 17 and 18 of the Act, which are the only sections which expressly deals with the estates of Hindus.

In the present case the claim appears to be that the effect of the transfer executed under section 31 is not only to free the executors from the burden of administration, but to constitute the Administrator-General the trustee in place of the executors in respect of various religious trusts created by the will of the testator. It seems impossible that the section should have been intended to have an operation so foreign to the main purpose and object of the Act, which is to provide for the administration and protection of estates only under certain clearly defined circumstances. For the purpose of arriving at the true meaning of section 31 it is important to examine the various Acts relating to the office of Administrator-General in order to ascertain the object for which the office was created, and the steps by which, from time to time, the powers and functions appertaining to the office have been enlarged or restricted or otherwise modified.

The office of Administrator-General was created by Act VII of 1849, and the Act recites that the object of the Act is to disconnect the administration of the estates of British subjects —meaning European British subjects—from the office of Ecclesiastical Registrar, and to appoint an Administrator-General. That act only empowers the Administrator-General to take out administration to the estates of European British subjects.

Act VIII of 1855 amends the law relating to the office and duties of Administrator-General. By this Act the powers of the Administrator-General are somewhat extended. His functions are no longer confined to the estates of European British subjects. Section 11 specifies the circumstances under which the Administrator-General is required to take such proceedings as may be necessary to obtain administration to the effects of persons not being Hindus or Mahomedans. Sections 12 and 14 deal with the estates of persons whether Mahomedans or Hindus or not. Section 12 provides that in cases of danger of misappropriation it shall be lawful for the Court to make an order directing the Administrator-General to apply for letters of ad-

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

ministration to the effects of such persons, and section 14 empowers the Court, in cases where danger of mis-appropriation or waste is to be apprehended, to enjoin the Administrator-General to collect and hold the property of deceased persons whether Mahomedans or Hindus or not.

It is to be observed, therefore, that the powers of the Administrator-General, so far as they relate to the estates of Hindus, are of a strictly limited character, and are only to be employed for the preservation of property where there is danger of waste or mis-appropriation. Neither in the Act of 1849 nor in that of 1855 is there any provision for the transfer of estates, such as we find in the two subsequent Acts.

The next Act, XXIV of 1867, is described as an Act to consolidate and amend the law relating to the office and duties of Administrator-General. This Act followed very shortly after the Indian Succession Act. Section 179 of the latter Act provides that the property of deceased persons is to vest in the executor or administrator as the case may be. This law was to be applicable to all cases of intestate or testamentary succession throughout British India, but by section 331 the estates of Hindus, Mahomedans or Buddhists are specially exempted from its operation.

In Act XXIV of 1867 the classification of persons adopted for the purposes of the Act is—(1) any person not being a Hindu, Mahomedan or Buddhist; and (2), any person whether a Hindu, Mahomedan or Buddhist or not.

Under this classification we find that by sections 17 and 18 of the Act, which closely correspond to sections 12 and 14 of the Act of 1855, the powers of the Administrator-General as to estates of Hindus are strictly limited to cases where danger of waste is apprehended. The Act of 1867 is however important as containing a new provision, namely, for the transfer of estates by private executors or administrators to the Administrator-General. Section 30 gives the right of transfer, with the previous consent of the Administrator-General, *to any private executor or administrator.* The question is whether the executor of a Hindu testator is within the words *any private executor.*

So far as regards the time when Act XXIV of 1867 was passed, the point is free from doubt. The executor by section 30

may "transfer all estates, effects and interests *vested* in him by virtue of such probate." At that time these words were inapplicable to the case of a Hindu executor. Section 30 further provides that upon the transfer being effected "the Administrator-General for the time being shall have the rights, and be subject to the liabilities which he would have had, and to which he would have been subject, if the probate had been granted to him at the date aforesaid"; the "*date aforesaid*" being, I take it, the date of the transfer. These words seem to me to indicate that the intention was to limit the operation of the section to the estates of persons as to which the Court would have had authority under section 16 to grant administration to the Administrator-General by reason merely of the unwillingness or inability of private executors, or other persons entitled to administration, to apply for such administration. In that view, section 30 would only deal with those cases where executors or administrators of persons mentioned in section 16 became unwilling or unable to act, *after* taking out probate or letters of administration. It would *not* apply to those cases where the Court had no power to grant administration to the Administrator-General, unless, besides the unwillingness of the private executor or other person entitled to administration, it was further shewn that there was danger of waste or mis-appropriation to the estate which would otherwise remain unprotected. The latter class of cases come within sections 17 and 18 of the Act, which are the only sections applicable to the estates of Hindus. Moreover, turning to the statement of the objects and reasons of the Act, we find that section 30 was intended to meet the case of private executors and administrators about to leave the country.

These considerations seem to show that the words "any private executor or administrator" did not include the executor or administrator of any person falling within the larger classification of persons adopted in the Act, "whether Hindu, Mahomedan or Buddhist or not," but were intended to be confined to the restricted class of persons "not being Hindu, Mahomedan or Buddhist."

In the present Act (II of 1874), sections 16, 17 and 18 and section 31 are in substance nothing but the re-enactment and reproduction of sections 16, 17 and 18 and section 30, respectively, of the Act of 1867. The classification of persons whose estates

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

are dealt with, and the phraseology of the sections, with one unimportant exception in section 31, are the same as in the Act of 1867.

Was it intended, by reason of the enactment of the Hindu Wills Act in 1870, to give section 31 a wider signification and a wider operation than was intended by the Legislature to be given to section 30 of the old Act when the last mentioned section was framed? Having regard to the principles of construction which are to be adopted in arriving at the intention of the Legislature laid down in the case of *Hawkins* v. *Gathercole* (1), and looking to the circumstances under and in respect of which section 31 was enacted, I am constrained to answer this question in the negative. That section 31 was not intended to give the executors or administrators of persons exempted from the Succession Act an unrestricted right of transferring or otherwise disposing of estates vested in them is shown, I think, by subsequent legislation. Section 90 of the Probate and Administration Act in its original form gave executors the right of disposing of the property of deceased persons in their hands, either wholly or in part, *only with the consent of the Court.* This restriction continues so far as administrators of exempted persons are concerned, but in the case of an executor it is maintained only in a limited form by the amending Act VI of 1889, which contains the following provisions: "The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him, by an order in writing notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order."

For these reasons, in my opinion, section 31 of Act II of 1874 must be read in a limited sense, and the words "any private executors" must be held to apply to executors and administrators of persons of the class mentioned in section 16, that is to say persons not being Hindus, Mahomedans or Buddhists.

If that construction is correct the transfer relied upon on behalf of the Administrator-General does not come within section 31, and in that view I must order the injunction asked for to issue.

(1) 6 De G. M. and G., 20.

From this order the Administrator-General appealed.

Mr. *Woodroffe*, Mr. *Phillips* and Sir *Griffith Evans* for the appellant.

The *Advocate General* (Sir *Charles Paul*), Mr. *Pugh* and Mr. *Stephens* for the respondent.

Mr. *Woodroffe*.—The question here is whether or not under section 31 of Act II of 1874 the Administrator-General can accept a transfer of the office of executor from the executors named in the will of a Hindu testator. It was argued in the Court below that a Hindu executor has no estate vested in him by the probate or letters of administration But there have been many estates, both of Hindus and Mahomedans, transferred to the Administrator-General under this section. The will in this case was made after the passing of the Hindu Wills Act, and section 179 of the Succession Act has been made applicable to this will. As soon as section 179 was made applicable to Hindu wills, then, whatever may have been the case before, the estate of a deceased testator vested in the executor as such, but it has not been decided to what extent the sections of the Succession Act govern the case of intestacy amongst Hindus. This however is the case of a testate Hindu. The section deals with the case of a grant of probate direct to executors or to letters of administration with the will annexed. This is so under section 196 of Act X of 1865, which is also applicable to Hindus. But before section 179 was applied, a Hindu or Mahomedan executor or administrator had at least the powers of a person acting under letters *ad colligenda bona*. Instances of transfers made to the Administrator-General are numerous, *viz.* of executorship in the estates of *Obhoy Churn Sen* in November 1872, of *Lal Churn Mitter* on 15th December 1874, of *Krishto Kamini Dassee* on the 15th July 1878, of *Kasinath Mullick* on the 4th March 1879, of *Nobo Coomer Sett* on the 20th November 1883, of *Kanai Lal Seal* on 24th November 1886, and transfers of administratorship in the goods of *Panai Lal Seal* on the 24th November 1886, and in the goods of *Sahazade Mahomed Manoodden* on the 25th January 1888. Of these transfers five have come up before the Courts at various stages, and have been given effect to, and in one of them the question of the *quantum* of interest which the Administrator-General took was made the subject of decision. In

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

two of them allowances are paid by the Administrator-General for *deb sheba* under a decree of the Court.

The old Supreme Court granted letters of administration in the goods of intestate Mahomedans and Hindus within the limits of its jurisdiction, and also probates. The words of section 31 of Act II of 1874 correspond with the words of section 30 of Act XXIV of 1867 I do not admit that the Administrator-General could not have had a transfer from a Hindu executor or administrator before the Act of 1874. An executor even then had some interest in him. It is not necessary that an estate should be vested in the executor. The existence of jurisdiction in the Courts in these matters is old. In *In the Goods of Bebee Muttra* (1) decided in 1832, it was said that probate had been granted to the Ecclesiastical Registrar as early as 1776– that jurisdiction the Supreme and the High Court have succeeded to; and in *In the goods of Hossein Ali* (2), the power of the Court to grant probate and letters of administration to intestate Mahomedans and Hindus is expressly recognised. In the case of *Sharo Bibi* v. *Baldeo Das* (3) it was decided that the executor took his title, not from the probate, but from the will operated on by Statute.

The ground for these grants was not convenience but jurisdiction under the Charter and Statutes. There was nothing to prevent a Christian being the executor of a Hindu estate, nor is there anything to prevent a Hindu being Administrator-General. We find the Ecclesiastical Registrar obtaining probate and administration to estates of Hindus and Mahomedans, and he had the power of dealing with such estates subject to the orders of the Court; and no instance can be shown in which the next of kin or beneficiaries had any right to eject a Hindu or Mahomedan executor save for misfeasance or nonfeasance. In *Sharo Bibi* v. *Baldeo Das* (3) Norman, J. says that the probate is evidence of the will as regards a stranger, but the case does not apply here. In *Jaykali Debi* v. *Shibnath Chatterjee* (4) Phear, J. proceeds on the ground that a Hindu executor has a power to alienate, but he says he may have less power to alienate than an English executor, but that does not show that he had no power to do so. The first

(1) Montriou's Morton, 191.
(2) Fulton., 339.
(3) 1 B. L. R., O. C., 24.
(4) 2 B. L. R., O. C., 1.

Act passed as to the Administrator-General of Bengal was Act VII of 1849, which abolished the Ecclesiastical Registrar and appointed an Administrator-General. The term "British subject" in section 2 means *all* persons residing in Calcutta, and as regards persons living outside, it means European British subjects. In Calcutta it means all persons living within the limits of the Original Civil Jurisdiction of the High Court. Under that Act there was nothing to prevent the Administrator-General from being the executor or administrator of a Hindu or Mahomedan, and what was there to prevent the transfer to him of a Hindu or Mahomedan estate? It is submitted that the Act of 1849 did not apply to British subjects only. But assuming that that Act was limited to British subjects, Act VIII of 1855 is not so limited, for under section 9 the Administrator-General is entitled to letters of administration to *any* deceased person.

The report of the Parliamentary Commission on Sir Thomas Turton's defalcation gives a list of estates, in Schedule D, belonging to Hindus and Mahomedans administered by Sir Thomas Turton, and the schedules of that report are dealt with in Act V of 1851, which shows beyond doubt that Sir Thomas was administering to those estates under right or under colour of his office as Administrator-General. Moreover Act VIII of 1855 was not passed to amend Act VII of 1849, but to amend the law. The scope of an Act may be enlarged so as to apply its clauses to persons and things other than those actually contemplated by it when passed—see Coke, Pt. II., 35 (Ed. 1809); Maxwell on Statutes, 93.

The next Act is Act X of 1865, section 179 of which is made applicable to Hindus. The objects and reasons for that Act show that it was intended to apply to everybody in India. Then follow Act XXIV of 1867 and Act XXI of 1870. Then Act II of 1874 gives power to the Administrator-General to accept transfers. Section 30 of Act XXIV of 1867 finds no place in former legislation, and if that section barred the transfer to the Administrator-General by reason of there being nothing in a Hindu executor to transfer, it is submitted that as soon as the Hindu Wills Act was passed this was remedied, and if not then it was remedied when Act II of 1874 was passed, which must be taken to refer to the

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

existing state of the law. Then section 90 of the Probate and Administration Act gave large powers to Hindu executors and administrators.

The case of *Hawkins* v. *Gathercole* (1) deals with the manner in which a Statute such as this should be construed.

[The Court here called upon the *Advocate-General.*]

The *Advocate-General* (*Sir Charles Paul*) for the respondent Administrator-General.—The property in this case is chiefly immoveable ; no estate in realty ever vested in any English or other executor by virtue of a grant of probate. Personal estate which vested in an English executor or administrator by grant depended on a history of its own, *viz.*, that in early ages the personalty was seized by the ordinary, until the Statute of Edward III which required the ordinary to make grants passing the property from himself to some one else. The ordinary made the grantee prove the will in the Ecclesiastical Court, and take out probate thereof. The Hindu and the Mahomedan were in the same position as to all sorts of property as an Englishman as regards realty ; probate was not necessary nor letters of administration as the estate vested in the next heir. That was the state of things until the Succession Act, when property first vested in an executor or administrator. The executor or administrator referred to in section 31 of Act II of 1874 is an executor or administrator in whom title vests by letters of administration or probate. The Act does not apply to Hindu executors save in sections 17 and 18, but it applies only to persons subject to the Succession Act.

"Private executor" means a person other than the Administrator-General. The executors and administrators referred to in section 31 are the executors and administrators, the subjects of the Act. The section never was intended to apply to a case of a transfer when the Administrator-General could not have been originally an administrator with the will annexed or otherwise.

If the executor originally named renounced probate, the Administrator-General could not apply, but according to section 31, as read by the other side, if the executor took out probate he could ; this is illogical. Section 16 enables the Administrator-General to apply in cases of testacy when the executor does not come forward,

(1) 6 De. G. M. & G. 1 (21).

saving in the cases of persons exempted under the Succession Act. It is submitted that it never could have been intended that the Administrator General should obtain administration in an indirect way when he could not do so in a direct manner. Section 16 applies to a class governed by the Succession Act; and section 17 applies to that class, *plus* Hindus, Mahomedans and Bhuddists. It is submitted that section 31 could not possibly apply to the class of persons referred to in section 17. The Hindu Wills Act does not say that the powers given by section 31 shall apply to Mahomedan and Hindu executors. Nor does the Hindu Wills Act refer to intestate estates pure and simple, but to cases of testacy with the will annexed. The state of things under the Hindu Wills Act is different from that under the Probate and Administration Act. That being so, section 31 of Act II of 1874 must be limited, otherwise it covers all cases of testacy and intestacy. It must therefore be limited by saying "administration with the will annexed." It is submitted therefore (*a*) that the Administrator-General's Act cannot be stretched so as to include another class of persons; (*b*) that the Hindu Wills Act lays down that the rights, duties and privileges of the Administrator-General shall not be interfered with; (*c*) that the words of the Hindu Wills Act do not fit in with the Administrator-General's Act; and (*d*) that if it had been intended to favor Hindus in this particular, it would have been expressly so provided.

The Probate and Administration Act by section 149 (*d*) declares also that the rights, duties and privileges of the Administrator-General are not to be affected. "Affect" means to curtail or enlarge or produce a change. The claim of the Administrator-General in this case is a privilege, and when you enlarge a privilege can you be said not to affect it under the Probate and Administration Act? Hindu and Mahomedan executors cannot sell save by leave of the Court, but if the Administrator-General can take by transfer from a Hindu executor, does he take subject to the restriction? The reasons for amending the Act of 1867 by the Act of 1874 were threefold: (*a*) to enable the Administrator-General to apply in cases of danger; (*b*) to compel the District Court to give notice when a person subject to the Succession Act died; (*c*) to transfer estates to the Official Trustee.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

As to Act II of 1874, section 15 merely gives the order in which preference will be given to those who may have the right to probate. It gives to the Administrator-General a right to apply for probate in some cases but not generally; that section only shows that the next of kin shall be preferred to him. If that section gave a general power, the rest of the Act would be useless. There is no reference in that section to what estates administration is to be granted; nor are any rights defined by it. In section 23, "any case" means in any case in which he might apply. Does section 15 carry the matter further than sections 16, 17, 18 and 30? The objects and reasons of Act II of 1874 show that one object of the Act was to enable the High Court to grant limited administration to the Administrator-General.

With regard to the transfers referred to by the other side, there is only one before the Hindu Wills Act, but after 1874 there are six or seven. The case of *In re Dhunput Sing* (1) shows that a course of decision is not to affect the law. As to the meaning of the words "British subject," it is not limited to the town of Calcutta, see 13 Geo. III, cap. 63, section 30; Smoult and Ryan, 41. Section 13 of the Charter gave general jurisdiction over the whole province, and makes no mention of "inhabitants of Calcutta." The case of *De Geer* v. *Stone* (2) gives the meaning of the term, and under the judgment in that case a native of India never could be a British subject. See also *Manickram Chattopadhia* v. *Meer Conjeer Ali Khan* (3); and under 39 and 40 Vic., Chap. 79, section 21, ecclesiastical jurisdiction is given to British subjects. The Statute 13 Geo. III., cap. 63, distinguishes between Native and British inhabitants. It is submitted that "British subject" means European British subject. The Collection of Debts Act (XX of 1841) shows who are British subjects; that Act does not vest any estate in the Administrator-General, it only empowers him to get in debts. *In the goods of Hossein Ali* (4) does not enlarge the Statute under which the Ecclesiastical Registrar was appointed. The Preamble of Act V of 1851 shows that Sir Thos. Turton was an officer of the Court on its Ecclesiastical, Admiralty, and Equity sides; and the Ecclesiastical Registrar

(1) L. R., 20 Calc., 771.
(2) L. R., 22 Ch. D., 243.
(3) Morton, 125.
(4) Fulton, 339.

could only take out administration to estates of British subjects. *In the goods of Bebee Muttra* (1) establishes that in cases of Hindu estates probate was not necessary; see per Ryan, C. J., in *Anund Chunder Ghose* v. *Soojeemoney Dossee* (2); and if it was not necessary, it would not vest the estate in the executor. See also Montriou's note on page 265 of his Edition of Morton. In *Ardaseer Cursetjee* v. *Perozeboye* (3), the Privy Council held that the ecclesiastical law was not applicable to Parsis. Bengal Regulation V of 1799, sections 2 and 3, shows that Hindus and Mahomedans need not apply to the Courts for probate or letters of administration; by section 4 of the Hindu Wills Act part of this Regulation is repealed. It was Fergusson's Act which enabled English executors to deal with realty. *Sharo Bibi* v. *Baldeo Das* (4) points out the difference between English and Hindu executors. Stress has been laid on section 179 of the Succession Act as vesting the estate in the executor as such; but sections 179 and 187 have not been extended to Hindus and Mahomedans but to Hindus only by the Hindu Wills Act. The effect of the Succession Act was to treat real and personal property alike. Section 179 must be read with section 187. It is submitted that a Hindu cannot come in under section 31 of Act II of 1874, because that Act, like the Act of 1867, deals only with those persons who are governed by the Succession Act. The word "executor" does not mean in section 31 any roving executor, but any one who may have come in and obtained probate as against the Administrator-General. The section only applies to executors and administrators under the Succession Act.

It has been pointed out that the Act of 1849 uses the words "estates, effects and interests vested," but that all that was intended by that Act was that every estate the Ecclesiastical Registrar had in his hands should be transferred to the Administrator-General. It was unnecessary to use the word "vest." Section 16 of the Act of 1867 covers the ground of the Succession Act; the "private executor," in that Act means a private executor who has taken out probate, or an administrator who has obtained letters of administration, under the Succession Act. Section 15

(1) Montriou's Morton, 191.
(2) Montriou's Morton, 231.
(3) 6 Moo. I. A., 348.
(4) 1 B. L. R. O. C., 24

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

of the Act of 1874 merely lays down a general proposition; there is no general power in the Administrator-General to apply for letters of administration anywhere; the power is of a limited and specific kind. I base my argument as to this on three grounds—(1) the meaning of the words "private executor;" (2) that until the Succession Act property of a deceased did not vest in an executor; and (3) that section 31 shows that the Administrator-General cannot take possession till he has taken out letters of administration.

As to the construction of the Act as referred to by the other side, I say that Maxwell on Statutes, 75, shows how the Act should be construed; the exceptions to that construction are pointed out on p. 93, but the exceptions do not apply here. Section 30 of Act XXIV of 1867 must be read with the Succession Act; as to an executor, he cannot appear before a Court and say he is an executor, save under section 179 of the Succession Act. It is said that probate is mere evidence of title, but I say it is a decree declaring a title. Before the Hindu Wills Act probate and administration to Hindu estates was unnecessary; if a thing is unnecessary it has no effect. Then with regard to the particular estate mentioned in section 30 of Act of 1867 it did not vest in him by virtue of the probate. The executor there referred to cannot be a Hindu executor; see *Lallubhai Bapabhai* v. *Mankuvarbhai* (1). It means a full executor, and not an executor limited in his action such as a native executor; such an executor could transfer no interest as he has none to transfer; he is merely a manager. Therefore I say "private executor" is not a Hindu executor. As to the schedule referred to in Act V of 1851 it is said that Sir T. Turton administered to estates of Hindus, and that subsequent legislation went on on that basis, but the fact that Government accepted the liability of Sir T. Turton proves nothing. He had no right to administer to native estates, he merely assumed to do so. But assuming that Sir T. Turton, as Ecclesiastical Registrar, could do so, the Administrator-General is a new officer, the creation of Statute, and has his powers defined by that Statute. The Administrator-General did once apply to this Court before Mr. Justice Trevelyan for letters of administration to a native

(1) I. L. R., 2 Bom., 388 (406.)

estate, but was refused—*In the goods of Hurry Dass Neogy* (1). There is no section in the Act of 1874 giving the Administrator-General power to take out letters of administration to Hindu estates. The fact that the Legislature when repealing the Act of 1867 by the Act of 1874 did not in the latter Act enlarge the rights of the Administrator-General (his rights being saved under the Act of 1870) shows that it did not intend to give him the right of taking a transfer except in the cases specified in the Act; but assuming that it was so intended then an absurdity follows, *viz.*, that the Administrator-General could not take out letters of administration to the estates of Hindus, yet he could take such an estate by transfer. Act II of 1874 did not intend to enlarge the operation of section 30 of the Act of 1867. That Act was passed for the purpose of adding two sections which do not touch the subject. Assuming that the words in section 31 are wide enough to let in Hindu executors or administrators, it is obvious that such was not the intention: *Hawkins* v. *Gathercole* (2).

The Probate and Administration Act saves the rights of the Administrator-General; his rights are not to be "affected," which means to produce a change. The meaning of section 31 of Act of 1874 is changed if it is applied to Hindus. When "affecting" means "affecting injuriously" the Legislature takes care to say so. In *Gopal Lal Seal's case* (3) Pigot, J., says: "The Act must be read as saving rights and not as cutting them down." Section 2 of the Hindu Wills Act is strongly in my favor as it extends certain provisions of the Succession Act to wills and codicils of Hindus. As to the position of a Hindu executor after the passing of Act V of 1881 see *Moosa* v. *Essa* (4).

Mr. *Pugh* on the same side.—As to the difference between amending, repealing and re-enacting Acts see Maxwell, 40, 44. The repealed Act has to be considered. There is no intention by the Legislature to alter the scope of the Administrator-General's Act, because if in the Act of 1867 it was not intended that the Administrator-General should take estates by transfer then in the Act of 1874 there is nothing that gives him that power. Mr. Justice Pigot's decision in *Gopal Lal Seal's case* does not

(1) Unreported.
(2) 6 De G. M. and G. 1.
(3) Unreported.,
(4) I. L. R, 8 Bom., 241.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

turn on the validity of the transfer to the Administrator-General. General words in an Act can be cut down by the context, and by the course of previous legislation, see *Chorlton* v. *Lings* (1), *Wilson* v. *Town Clerk of Salford* (2), *Beresford Hope* v. *Lady Sandhurst* (3), *The Dowse* (4), *Everard* v. *Kendall* (5). Act XX of 1841, section 20, clears up two matters, *viz.*, the meaning of the words "British subject," and shows that probates and letters were granted, but only for the purpose of getting in debts. The Hindu Wills Act has no effect on the Administrator-General's Act—*Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (6).

Mr. *Woodroffe* in reply.—With reference to the unreported applications made, *Gopal Lal Seal's* case proceeds on the footing of a transfer. Amongst the transfers to the Administrator-General made between 1871 and 1888 there have been before the Court some seventeen applications, and in none of them was the question of the validity of the transfer raised. The Act of 1849 refers no doubt to British subjects, but by section 2 all the estates then in the hands of the Ecclesiastical Registrar were transferred to the Administrator-General. It appears from the case of *In the goods of Bebee Muttra* that the Court had general ecclesiastical jurisdiction to grant probate to Hindus residing in Calcutta, even although all the property was not in Calcutta. Since then down to 1882 probates and letters of administration have been granted to wills of Hindus and Mahomedans; and the estates of vast numbers of persons, Greeks, Parsis and others, and those of mixed blood have been administered. It further appears that Russell, C. J., has held that jurisdiction was not given by means of the applicants being British subjects, but that the words "British subjects" in the Charter could not be taken to cut down the general powers of the Supreme Court given by the Statute of Geo. III. Since that time there has been no change in the law. It is idle to say that the law does not include Hindus and Mahomedans, assuming that the Act of 1849 deals only with European British subjects, but it is clear that section 2 deals with a larger class. That Act was repealed by Act VIII of 1855, which deals with British

(1) L. R., 4 C. P., 374.
(2) L. R., 4 C. P., 398.
(3) L. R. 23 Q. B. D., 79.
(4) L. R., 3 A. & E., 135 (140).
(5) L. R., 5 C. P., 428.
(6) I. L. R., 8 Calc., 378.

subjects, non-British subjects, and Hindus and Mahomedans. It includes all classes of persons, and there are in it general provisions which are in no way limited; see sections 9, 10, 11, 12 and 17; the latter section is however limited in its proviso. Then followed the Succession Act which applies to all British India except as provided by section 331, 332. It applied to Parsis with the exception of those parts excepted by the Parsi Succession Act of 1865, *viz.* sections 20—24, 26—28, 29—43. Therefore sections 179, 187, 191 of the Succession Act all apply to Parsis. Section 179 is a statutory announcement that executors and administrators are personal legal representatives; the section is not cut down by sections 187, 190. It is said that section 30 of the Act of 1867 does not apply. Assuming that the Administrator-General could not obtain letters of administration general or with the will annexed to estates of Hindus and Mahomedans, how then are the provisions of section 30 to be cut down.

Before the Hindu Wills Act Hindu executors and administrators transferred and mortgaged estates. The case of *Tarachand Coondoo Chowdry* (1) shows that probate was granted to a Hindu for the purpose of enabling him to deal with Bank of Bengal shares. *In the goods of Dumoodhur Doss* (2), letters of administration were given to the Administrator-General. In *Loganada Mudali* v *Ramaswami* (3) it was held that an administrator could dispose of property. In *Sreemutty Dossee* v *Tarrachurn Coondoo Chowdhry* (4) an executor mortgaged property; it is not an authority for saying that he had no power whatever, but was only a manager, but this case shows that he was tied down by the will. Long before 1865 estates and interests were vested in executors, European as well as Hindu and Mahomedan. The Legislature, however, dealt with the Ecclesiastical Registrar as an executor or administrator having an interest vesting in him in estates of Hindus and Mahomedans; such an interest was not a beneficial interest only. It is submitted that the words "estates, effects and interests" do not cut down the words "private executors or administrators." I refer to *Ex parte Arrowsmith* (5) as to the Act of 1874 being construed according

(1) Bourke, Pt. V., 3.
(2) Bourke, Pt. V., 6.
(3) 1 Mad., 384.
(4) Bourke, A. O. C., 48.
(5) L. R., 8 Ch. D., 96.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

to the state of things in force at the time of its passing. The first part of section 15 is identical with the section of the former Act, but the latter part referring to the Administrator-General was added owing to the passing of Acts of 1865 and 1870. That section contemplates the Administrator-General obtaining administration in Calcutta and in the mofussil, but after the next of kin; this was added because creditors under the Hindu Wills Act could have taken out letters of administration. The Act of 1874 left the Administrator-General entitled to take out probate and letters in all cases in which he could do so before, but he could have taken out administration to a Hindu in Presidency towns at any time.

A Hindu executor or administrator has a right to probate or letters of administration under the term "private executor or administrator." Section 31 applies to Parsis and Hindus amongst others. A Parsi at the passing of the Act of 1874 must have proved the will to establish his right under it, and must have taken out letters in the case of an intestacy. The preamble of Act IX of 1881 shows that the Legislature wanted to put Parsis on the same footing as Hindus and Mahomedans, and this was done by leaving section 31 of Act of 1874 as it was and adding the words "Parsis, Mahomedans and Buddhists" in sections 16, 17 and 18, and they struck the words "Hindu, Mahomedan and Buddhist" out of section 36, leaving the words "any person:" and in section 40 they entitled the Administrator-General to come in notwithstanding. So that the words "any private executor" would have to be construed differently in different sections.

The following judgments were delivered by the Court (PETHERAM, C.J., and PRINSEP and TREVELYAN, JJ.) :—

PETHERAM, C.J.—The question we have to consider is whether the executor appointed by a Hindu testator who made his will in 1889, and died in 1891, can, after he has obtained probate, transfer the estate, effects and interests, vested in him by virtue of such probate, to the Administrator-General under section 31 of the Administrator-General's Act (II of 1874). Mr. Justice Sale has come to the conclusion that he cannot, as he thinks that the estate of a Hindu is not within any of the provisions of the Act, except sections 17 and 18, which are expressly made applicable to such

estates. The argument on both sides has dealt, not only with the Act upon which we have now to put a construction, but with the history of the office of Administrator-General, and with the conditions under which the various Acts by which it has been constituted have been passed; and in what I have to say on the subject I propose to follow the same course.

The office was first constituted by Act VII of 1849 to supersede that of Ecclesiastical Registrar, and that Act deals exclusively with the estates of British subjects dying within the Presidency of Fort William in Bengal. Act VIII of 1855 was on the 3rd of March 1855 substituted for Act VII of 1849 which was then repealed. The Act of 1855 deals with the three Presidencies, and contains special provisions with reference to the estates of Mahomedans and Hindus. Section 9 provides in general terms that any letters of administration or letters "*ad colligenda bona*" granted by the Supreme Court shall, unless they are granted to the next of kin, be granted to the Administrator-General, in preference to a creditor or next friend. Section 10 defines "next of kin." Section 11 provides that the Administrator-General must take proceedings to obtain letters of administration of the estates of all persons, whether British subjects or not, who were not Mahomedans or Hindus, who have left more than Rs. 500 within the jurisdiction of the Supreme Court, when no person has within a month applied for administration. Section 12 provides that upon the death of any person, whether a Mahomedan or Hindu or not, and where the assets are in danger, the Court may grant administration to the Administrator-General, and section 14 provides that the Court may in such cases enjoin the Administrator-General to take possession of the assets. In 1855 there was no statutory law in this country relating to the administration of either testate or intestate estates, and in the case of Hindu estates the executor or administrator of the deceased took no estate in his property equivalent to that taken by the personal representative of a deceased person under English law, but was merely an agent for the purpose of distributing the property according to law or according to the will of the deceased—*Sharo Bibi* v. *Baldeo Das* (1). In 1865 the Indian Succession Act (X of 1865) was passed dealing with the succession to all persons

(1) 1 B. L. R., O.C., 24.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

dying in British India, except Hindus, Mahomedans and Buddhists (section 331), and except any of the members of any race, sect or tribe in British India or any part of such race, who might be exempted from its provisions by the Governor-General in Council (section 332). Section 179 provides that an executor or administrator shall be the legal representative of the deceased for all purposes, and that all the property of the deceased person shall vest in him as executor or administrator. Section 187 provides that the right of an executor or administrator can only be established in any Court, if probate or administration shall have been granted to him, and section 191 that letters of administration should entitle the administrator to all rights belonging to the intestate, as effectually as if the administration had been granted at the time of his death.

In 1867 the Administrator-General's Act of 1867 (Act XXIV of 1867) was passed. By it the Act of 1855 was repealed, and the new Act substituted for it. Section 15 takes the place of section 19 of the old Act. Section 16 that of 11, and sections 17 and 18 that of 12 and 14. It is apparent that this Act was passed with special reference to the provisions of the Indian Succession Act, as in section 16 persons exempted from the operations of the Succession Act under section 332 are added to Hindus and Mahomedans, and with them are exempted from the operation of section 16. By section 30 of this Act the power was first given to a private executor or administrator to transfer the estate, effects and interests vested in him, by virtue of the probate or letters of administration, to the Administrator General, and so to relieve himself of all further liability or concern with the estate. In 1870 the Hindu Wills Act (Act XXI of 1870) was passed, and by it some sections of the Indian Succession Act, amongst others, sections 179, 187 and 191, were made to apply to all wills of Hindus, within the territories of the Lieutenant-Governor of Bengal or the Original Civil Jurisdiction of the High Court, but section 5 provided that nothing in the Act should affect the rights, duties and privileges of the Administrator-General.

In 1872 a Bill was introduced into the Council of the Governor-General to amend the Administrator-General's Act of 1867 by the addition of two sections, the objects of which, as stated by Mr. Stephen who introduced the Bill, were to extend the opera-

tion of the Act to Native States where there was a European community, and to clear up some uncertainty as to the meaning of the word "distribution" in section 52. The Bill was referred to a Select Committee whose report was presented by Mr. Hobhouse on the 27th of January 1874. The report recommended that several small amendments should be made, but did not notice the change in the position of executors of Hindus, which had been effected by the Hindu Wills Act. Mr. Hobhouse in presenting the report said that the only point which it was necessary to mention was that, inasmuch as the Act of 1867 had already been amended twice, the Select Committee thought it better to repeal the existing Acts, and re-enact them so as to have the law conveniently within the compass of a single enactment. Upon this the Administrator-General's Act of 1874 was passed, and it is the Act which we are now to construe.

The present Act, except as regards the amendments mentioned by Mr. Stephen in 1872, is practically a re-enactment of the Act of 1867, sections 15, 16, 17, 18 and 31 being in substance reproductions of sections 15, 16, 17, 18, and 30, and the Advocate-General argues that, as this is the case, we must, in construing the Act of 1874, have regard, not to the state of the general law on the day in 1874 when it was passed, but to the state of the general law in 1867 when the Act of that date, of which the Act of 1874 is a re-enactment, came into force. No authority has been cited in support of this argument which, as far as I can ascertain, is quite new ; but reliance is placed on the fact that neither in 1872, when the Bill to amend the Act of 1867 was introduced by Mr. Stephen, nor in 1874, when the report of the Select Committee was presented by Mr. Hobhouse, is any trace to be found of any intention on the part of the Legislature to change the position of the executor of a deceased Hindu. In my opinion the history of the Act of 1874 is inadmissible to explain it, and we ought not to consider what was the intention of the Members of Council by whom it was introduced (see the cases collected in Wilberforce on Statutes, page 105). But even if we do consider its history, as it appears from the reports of the proceedings which I have mentioned, I think it is altogether insufficient to show that it was not intended that the ordinary presumption should apply,

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

that the Legislature were aware of the then existing state of the general law, and that the Act of 1874 was enacted by them with reference to the general law which was in existence when it came into operation, and concurrently with which the new particular law would operate. The Act came into force on the 10th of February 1874, the Act of 1867 being repealed at the same moment, and from the time when the new Act came into force, it was the only law in existence relating to the office and duties of the Administrator-General, and the office which he has since held, and the duties for which he has since then been responsible, are those created by that Act, and by that Act only, and in considering the nature of his office and duties we must, I think, look at the general law relating to the position of the executors or administrators of testate or intestate estates at and since that moment, and not at their position at any earlier period.

It is argued for the plaintiff that the meaning of the words "any private executor or administrator" in section 31 of the Act of 1874 must be limited to the executor or administrator of any estate to which the provisions of the Indian Succession Act were applicable when that Act was passed, because the right given to the Administrator-General by section 16 of the Act is limited to the estate of persons to whom the Indian Succession Act applies, and because it is said that the general scope of the Act shows that it was not intended to apply to any other estates. It is also contended that section 15 of the Act only prescribes the order in which persons who are otherwise entitled to them shall be entitled to grants of administration, and does not give the Administrator-General any right to apply for a grant in any case; and further that no executor or administrator of any estate, except those within the provisions of the Indian Succession Act, could transfer the estate, effects and interests of his testator under that section, as they were not vested in him. In my opinion the last of these contentions rests upon no foundation of fact, as it is certain that after the passing of the Hindu Wills Act of 1870 the whole estate of a Hindu testator was vested in the executor of his will, in precisely the same way as that of an English testator who had died and whose will had been proved in this country was vested in him; and it is clear that after the passing

of the Hindu Wills Act the executor of the will of a Hindu was in precisely the same position as the executor of the will of a European, inasmuch as the sections of the Indian Succession Act, which deal with the position and interest of executors, are made to apply to Hindu's wills; and if the executors of Europeans are within the scope of the Administrator-General's Act, the executor of a Hindu must be within it also, inasmuch as their positions with reference to the estate of their testator are precisely the same. It cannot in my opinion be successfully contended that section 15 of the Act does not confer on the Courts the power to grant letters of administration to the Administrator-General in some cases, inasmuch as they have always been granted to him in the case of Europeans, in cases which are not within the provisions of section 16, and if section 15 does not give them the power to grant them to him, I cannot find any section which does; and if the section gives the Courts the power to grant them to him, in the case of Europeans, I am of opinion that it gave them the same power in the cases of Hindus and Mahomedans if they had the power to make a grant in respect of such estates at all. It is no doubt the case that grants of probate or letters of administration were not necessary before 1870 for the administration and distribution of the estates of Hindus and Mahomedans, but there is no doubt that in many such cases grants were before then in fact made by the Courts, in respect of such estates, and if they had the power to make such grants at all, I think that they had the power to make them to the Administrator-General under the Acts of 1855, 1867 and 1874. Assuming, however, that they had no such power, it could not have been because the words of the Acts are not wide enough to give it, as the words are general and, unless restrained by the rest of the Act, must include every one, but because such grants were not necessary in cases of the estates of Hindus and Mahomedans, and that therefore it cannot be supposed that the Legislature intended to give the power to the Courts to make grants which would be useless. If this argument is sound, the powers of the Courts, as far as the Administrator-General is concerned, were not affected by the Act of 1870, as that Act only deals with estates of Hindus where the deceased has left a will, and appointed his own executor; but this fact could

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

not, in my opinion, prevent section 31 from operating upon the new interest which was created by the Act in the executor of a Hindu.

Whether, however, this was so or not, the whole condition of affairs was changed in 1881, which was long before either the will or the transfer with respect to which the present question arises. In that year the Probate and Administration Act was passed, and since that time grants of probate and administration are as necessary for the administration and distribution of the estate of Hindus and Mahomedans as they are for those of Europeans, and as since then they are in precisely the same position, I think that the Courts must have the same powers of granting letters of administration to the Administrator-General to the estates of Hindus and Mahomedans, under section 15 of the Act of 1874, as it has to make the same grants with reference to other estates ; and that since then at all events it is impossible to say that a right can be transferred to the Administrator-General under section 31 which could not be granted to him by the Courts under the earlier sections of the Act. Section 16 is no doubt limited to estates which are within the provisions of the Indian Succession Act, but that section deals with very particular cases, and I do not think the fact that the duties of the Administrator-General under it are limited to those cases can be sufficient to limit the powers of the Courts under the other sections which are general in their terms. It is true that section 5 of the Hindu Wills Act provides that nothing in that Act contained shall "affect" the rights, duties and privileges of the Administrator-General, and it is argued that "affect" in that clause means change, and that if the effect of section 179 of the Indian Succession Act, when incorporated in the Hindu Wills Act, was to enable the Administrator-General to accept a transfer of a Hindu estate under section 30, it would change his rights and duties, and its operation on him would be prevented by section 5 of the Act of 1870 ; but assuming that this is the correct reading of the section, the present Administrator-General was not appointed under the Act which was then in force, and is not exercising any powers under it, but derives all his rights, duties and privileges from the Act of 1874, and I do not think that the rights, duties and

privileges of an office created by the Act of 1874 can be affected by a clause in the Act of 1870, which saved the rights, duties and privileges of an office which was created in 1867 and was abolished in 1874.

It is said in the case of *Leverson* v. *The Queen* (1) that acts which have been done under a Statute may be taken into consideration in construing it, and in the present case what has taken place since the Hindu Wills Act was passed would seem to indicate that it was understood to be the intention of the Legislature in passing that Act to bring Hindu estates within the operation of section 30 of the Act of 1867; but that some doubt having arisen as to the effect of the saving clause in the Hindu Wills Act, it was decided to repeal the Act of 1867 and to re-enact it in 1874 to avoid any such difficulty. It appears from the records of the office that the first time on which the estate of a Hindu was transferred by his executor to the Administrator-General was on the 6th of November 1871. Afterwards transfers were made of Hindu estates on December 5th 1874, July 15th 1878, March 4th 1879, July 21st 1884, November 25th 1886, and September 20th 1888. In 1881 the Probate and Administration Act of 1881 was passed, which applies to the estates of all persons to whom the Indian Succession Act does not apply. By it so much of the Hindu Wills Act as incorporates section 179 of the Indian Succession Act is repealed, but section 4 of the new Act is identical in its terms with section 179 of the Succession Act, so that, since the passing of that Act, the position of the executor or administrator of a Mahomedan or Hindu has been the same as that of the executor or administrator of a European, and we find that on the 25th of January 1888 the administrator of a Mahomedan transferred the estate to the Administrator-General under section 31 of the Act of 1874.

The number of the estates which have been transferred by Hindu or Mahomedan executors and administrators since 1870 is no doubt small, but some of them are large, and I have no doubt that there has never been a time in recent years in which a substantial part of the business of the office has not been connected with such estates; indeed, there has been a good deal of litigation in this Court arising out of them, to which the Administrator-

(1) L. R. 4 Q. B., 394.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

General has been a party, so that the practice has for years been notorious.

In what I have said so far I have assumed that section 5 of the Hindu Wills Act was sufficient to prevent the Administrator-General from accepting a transfer of the estate of a Hindu under section 30 of the Act of 1867, and I have done so because I think it makes no difference to the result of this case, whether it was so or not, and because I think the course of business in the office, which I have before noticed, indicates that this view was taken by the Legislature, but in my opinion that is not by any means the case. The marginal note to section 5 is "saving the rights of the Administrator-General, Bengal," to section 149 of the Probate and Administration Act it is "saving clause," and although the marginal notes are not any part of the Act they do, I think, indicate that the object of both sections was to save the existing rights, duties and privileges of the Administrator-General and not to prevent him from acquiring any new ones if any such were conferred upon him by the Act; but, however that may be, I am of opinion that no new rights, duties or privileges were in fact conferred upon him either by the Act of 1870 or by that of 1881, or that his position was changed or affected by either of them. The right and privilege of the Administrator-General under section 30 of the Act of 1867 and under section 31 of the Act of 1874 was to take over the estate of the deceased from any executor or administrator who had the power to transfer it to him. His duty was to administer the estate according to law, and those rights, duties and privileges are the same to-day as they were in 1867, when the Act of that year came into force. The persons whose positions have been affected by the Hindu Wills Act and the Probate and Administration Act are the executors and administrators of Hindus, Mahomedans, and all the other inhabitants of India who are not within the provisions of the Indian Succession Act. By the Hindu Wills Act the executor of a Hindu was placed in precisely the same position as the executor of a European who had died in India, and by the Probate and Administration Act the same change was made in the position of all executors and administrators in India who were not within the provisions of the Indian Succession Act, and when that was done I think that first

the Hindu executor in 1870, and afterwards all other executors and administrators in 1881, were brought within the operation of the transfer sections of the Administrator-General's Acts, by virtue of the principle which has been constantly acted upon, and which was stated by Lord Holt in the case of *Lane* v. *Cotton* (1) to be, that "when an Act of Parliament creates a new interest it shall be governed by the same law that like interests have been governed before." This principle has been acted upon and illustrated in a number of cases, which will be found collected in Wilberforce on Statutes, pages 166, 167, and in the case of *Queen* v. *Smith* (2) is again stated in somewhat different terms by Bovill, C. J. He says that when the earlier Statute deals with a genus within which a new species is created by a subsequent Act, the earlier Act will include the new species. In my opinion the present case is within the strictest reading of this principle. By the Act of 1870 a new interest is created in the executor of the will of a Hindu, and I think that to use the words of Lord Holt "such new interest shall be governed by the same law that like interests were governed before;" or, to apply the words of Bovill, C. J., the executors of Hindus are converted into a new species of executors by the Act of 1870 within the genus of executors upon which the older Acts, *i. e.*, the Administrator-General's Act of 1867, operated.

For these reasons, I think that this order cannot be maintained, and I would decree the appeal and dismiss the application with costs in both Courts.

I have thought it better to rest my judgment on the later legislation, because I think that the course of business since 1870 indicates that in the opinion of the Legislature a change in the powers of the executors of Hindus under these sections took place at that time, but in doing so, I am anxious not to be understood as expressing any opinion that the executor or administrator of a Hindu or Mahomedan had not in 1867 any interest in the estate of the deceased which he could have transferred to the Administrator-General under section 30 of that Act.

PRINSEP, J.—Some two and half years after probate had been obtained by the executors of the will of Nundo Lall Mullick, a Hindu, who died in 1891, they executed a deed purporting, under

(1) 12 Mod., 486. (2) L. R. 1 C. C. R., 270.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

section 31 of the Administrator-General's Act of 1874, to transfer to the Administrator-General all estates, effects and interests vested in them as executors.

The only point raised in this appeal is whether this is a valid transfer, that is, whether under section 31 of the Administrator-General's Act of 1874 the executor of the will of a deceased Hindu is competent to transfer by deed all estates, effects and interests vested in him by virtue of a probate or letters of administration obtained by him. The matter is complicated only by the course of legislation which has left in doubt and obscurity what might have been clearly expressed. It is true that this point has been raised now for the first time and only after some years, but the learned Counsel who appears for the Administrator-General has been able to show us only few instances in which such transfers have been made. We have not therefore a long and unvarying practice to assist us in deciding what is and has been accepted to be the intention of the Legislature. After a consideration of the legislation since the creation of the office of Administrator-General by the Administrator-General's Act VII of 1849, Mr. Justice Sale has held that no such power of transfer, as in this case, has been conferred on the executors of a will of a deceased Hindu.

I do not think it necessary to discuss what were the powers of Sir Thomas Turton who filled the office of Ecclesiastical Registrar under the late Supreme Court up to 1847. It is sufficient in my opinion that we should consider the state of the law since the creation of the office of Administrator-General in 1849, for that was a new office with certain specified duties attached to it, and it does not therefore necessarily follow that all the powers exercised by Sir T. Turton by virtue of that and other offices were conferred on the Administrator-General. Nor is it necessary to consider how far the powers so exercised were with or without the authority of law. Before the Act of 1849 creating the office of Administrator-General the only Indian legislation in respect of probates and letters of administration in regard to the estates of deceased Hindus in which any assets were within the local jurisdiction of the late Supreme Court, is to be found in Acts XIX and

XX of 1841. Section 20 of Act XIX of 1841 alone applied to the late Supreme Court, and it enabled that Court to direct the Ecclesiastical Registrar or one or more curators to collect and take charge of the effects of any deceased person who may have left moveable or immoveable property within the local limits of the jurisdiction of that Court, if it was "satisfied that danger is to be apprehended of the misappropriation and waste of the property before it can be ascertained who may be legally entitled to the succession to such property."

Section 14 of Act XX of 1841 expressly limited the effect of such probate and letters of administration to the recovery of debts only so as to provide security to debtors paying the same. That Act was expressly repealed only in 1860. So any powers exercised by the Administrator-General under probate and letters of administration granted by the late Supreme Court in respect of the estates of deceased Hindus would be limited in the manner just stated.

Act VIII of 1855 took the place of Act VII of 1849, repealing it. That Act provided specially for the estates of deceased Hindus. Section 9 directed that all letters of administration or letters *ad colligenda bona* which shall hereafter be granted by the Supreme Court of Judicature at any of the said Presidencies (that is, of Bengal, Madras or Bombay), shall be granted to the Administrator-General of the Presidency, unless they shall be granted to the next of kin of the deceased. Section 11 required the Administrator-General to obtain letters of administration, either generally or with the will annexed, to the effects of any person, *not being a Mahomedan or Hindu* who may have left assets exceeding Rs. 500 if probate shall not have been applied for within one month of his decease. (I have thought it unnecessary to set out this section in detail and accurately, as it is sufficient to show that in dealing with the estates of British subjects and others over which the Supreme Court had jurisdiction the estates of Hindus were expressly excepted.)

Section 12 empowered the Administrator-General, on the application of a person interested in the assets of the estate of a deceased person, whether a Mahomedan or Hindu or not, showing that danger

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

is to be apprehended of the misappropriation of such assets, unless letters of administration of the effects of such person are granted, to obtain from the late Supreme Court an order directing him to apply for such letters of administration. This was, it may be observed, a re-enactment of Act XIX of 1841, section 20. It may also be usefully here mentioned that the proviso to section 17 made a special exception in respect of the estates of a deceased Mahomedan or Hindu, if, on an application for the grant of letters of administration applied for under section 12 by the Administrator-General, the Court was satisfied that such grant was unnecessary for the protection of the assets.

Section 14 empowered the late Supreme Court to direct the Administrator-General to take charge of moveable or immoveable property within the local limits of its jurisdiction belonging to the estate of any deceased person, *whether a Mahomedan or Hindu or not*, if it was satisfied that danger is to be apprehended of the misappropriation and waste of such property before it can be ascertained who may be legally entitled to the succession to such property, or whether the Administrator-General is entitled to letters of administration to such deceased person.

Section 43 is the next section which demands attention in connection with this case. That section specially exempts estates of deceased persons, Mahomedans or Hindus, from its operation; it enabled the Administrator-General to grant a certificate to collect debts due to estates of all other persons, within the local limits of the jurisdiction of the late Supreme Court, when the effects do not exceed on the whole Rs. 500.

The Indian Succession Act (X of 1865) is the next legislative enactment relating to this subject, but that expressly does not apply to certain persons, and amongst others Hindus, so that it did not affect the previously existing law in respect to the administration of the estates of deceased Hindus.

In 1867 the Act of 1855 was repealed, and in many respects re-enacted, by Act XXIV of that year. Section 16 of the Act of 1867 re-enacted section 11 of that of 1855, except that the limit of the value of the assets to be administered was altered. Section 17 re-enacted section 12 of the Act of 1855, and the

proviso to that section repealed the proviso to section 17. Sections 18 and 33 re-enacted sections 14 and 43 of the Act of 1855. I have therefore thought it unnecessary to refer to these parts of the Act of 1867 at length.

But the Act of 1867 for the first time by section 30 empowered a private executor or administrator, with the previous consent of the Administrator-General, to transfer to that officer by an instrument in writing all estates, effects and interests vested in him by such probate or letters, and the Administrator-General was given the rights and made subject to the liabilities which he would have had, and to which he would have been subject, if the probate or letters of administration had been given to him.

In 1870 the Hindu Wills Act (XXI of 1870) was passed. This was what has been termed a skeleton Act. It extended and applied certain sections of the Indian Succession Act of 1865 to the wills of Hindus, and amongst these were sections 179, 187 and 191, which are important in connection with this case. Section 179 declared that the executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Section 187 provided that no right as executor or legatee can be established in any Court of Justice, unless probate of the will or letters of administration, with copy of the will annexed, shall have been granted. Section 191 declared that letters of administration entitles the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Section 5 of the Hindu Wills Act, however, provided that nothing contained in that Act shall affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay, respectively. From this I understand that in respect of all matters connected with the wills of deceased Hindus and others to whom the Hindu Wills Act applied, the position of the Administrator-General remained as before.

It will be necessary to refer presently to a portion of section 3 of the Hindu Wills Act, but I will pass on to state the course of legislation. In 1874 there was fresh legislation in respect

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

of the office of Administrator-General. Act II of 1874 is entitled an Act to consolidate and amend the law relating to the office and duties of Administrator-General. I find that since the passing of the previous Act of 1867 some Acts had been passed making several amendments in matters of no general importance. The consolidation was the incorporation of these Acts in one Act with the existing Act of 1867 which dealt generally with the subject. The amendment of the law so far as was expressly made was on matters which do not touch the case now before us. The sections of the Act of 1867 to which I have referred were re-enacted *verbatim* in the new Act so as to attain the object of consolidation, and amongst these section 30 of the Act of 1867 was re-enacted as section 31 of the Act of 1874.

It has been contended however that, having regard to the application of sections 179, 187 and 191 of the Indian Succession Act of 1865 by a new law relating to the office of Administrator General, it was the intention of the Legislature to alter the previously existing law as expressed in section 30 of the Act of 1867, and to make it what it would have been if that Act had been applicable to Hindus, or if the Hindu Wills Act of 1870 had been passed simultaneously with the Act of 1867. To determine this it is desirable that we should consider the intention of the Legislature so far as we can properly gather it from the course of legislation and the proceedings of the Legislative Council. I do not think that this is absolutely necessary for the purposes of this case, for the law, though obscurely expressed, can be ascertained. But I think that we are at liberty to do so, and that such a course of enquiry is open to us, and is in this instance satisfactory in its result, because in my opinion it confirms what in my understanding of the law is its proper interpretation as having been intentionally so declared.

It is contended that as section 179 of the Indian Succession Act of 1865, which was made applicable to the executors or administrators under the wills of deceased Hindus, declared that they shall be the legal representatives of such persons for all purposes, and that all the property of such persons shall be vested in them as such executors or administrators, the entire estate, not as a manager as held by the Courts, but absolutely, an executor or

administrator was competent under section 31 of Act II of 1874 to transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General.

There can be no doubt that when the Act of 1867 was passed the powers of an executor of the estate of a deceased Hindu was only that of a manager. The cases cited—*Sharo Bibi* v. *Baldeo Das* (1), and *Jaykali Debi* v. *Shibnath Chatterjee* (2)—are sufficient authorities for this, and the law was so understood or accepted. This had its origin from the principle under which the power of a Hindu to make a will originated. It was regarded only as a gift which *inter vivos* was legal under Hindu law, but was intended to have effect after the death of the donor testator. I find that this has been adopted by the Legislature, for section 3 of the Hindu Wills Act provides that nothing in the Act "shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which but for section 2 of this Act he could not deprive them by will." And it cannot, I think, be disputed that as the law was accepted in 1867 when the Administrator-General's Act (XXIV of 1867) was passed, the executor of the will of a deceased Hindu had no "estate, effects or interest" vested in him which he could have transferred to the Administrator-General under section 30 of that Act. Moreover, by reason of section 5 of the Hindu Wills Act, 1870, the position of the Administrator-General in respect of such executors remained unaltered. The application of section 179 of the Indian Succession Act of 1865 to Hindu wills, with the limitation enacted by section 5 of the Hindu Wills Act, did not alter the law. The question then arises, was there any alteration in the law in consequence of the passing of Act II of 1874?—the Act to consolidate and amend the law relating to the office and duties of Administrator-General.

I do not, first of all, regard this Act as creating a new office with new duties. It was a more convenient mode of expressing the old law with some amendments, and I find no indication in it of any intention to modify the previously existing law and practice in regard to the manner of dealing with the estates of Hindu testators after probate and letters of administration have been

(1) 1 B. L. R., O. C., 24. (2) 2 B. L. R., O. C., 1.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

obtained. With the practice adopted by our Indian Legislature, it is extremely difficult, if not impossible, to apply all the rules laid down by the Courts in England for ascertaining the intention which has caused the passing of any particular law. The course of legislation in this country affords a tolerably sure guide, because such measures are the acts of a Government having some claim to a continuous policy, and whenever any departure from that policy in any matter of importance to the general community or even to a large body, such as Hindus, has been arrived at, it is almost always clearly and emphatically indicated.

Accordingly the introduction of any Bill into the Legislative Council is always accompanied by a statement of the Objects and Reasons for the proposed measure. On these grounds, I believe, the Judges of our Court have taken this statement of Objects and Reasons into consideration as having some indication of the motives which have caused legislation on any particular subject and the object which it is desired to attain. I would refer only to the judgment of a Full Bench of this Court—*Queen-Empress* v. *Kartick Chunder Das* (1).

An original Bill is, as experience has shown, considerably altered in its character and scope while passing through the Legislative Council, and chiefly after its committal to a Select Committee for report, after consideration of the opinions expressed by various persons, official and non-official, on the measure before the Council. As an easy and certain way of learning the amendments contemplated and proposed by the Select Committee it is not unusual, and I think not improper, to refer to the Report so made. The Report contains mention not only of the proposed amendments of the law but generally reasons for recommending them. By this means we can learn the reasons for which legislation has been thought necessary, and the objects in view, that is, the particular points on which it is desired to amend the existing law or for passing any new law. With this explanation I think that there is nothing inconsistent in our practice with the rules laid down by the Courts in England. I should also state that the statement of Objects and Reasons for the introduction of any Bill into the Legislative Councils, as well as the Report of any

(1) I. L. R., 14 Calc., 721.

Select Committee to whom the Bill may be committed for report, are invariably published under authority of Government in the Government Gazette for public information.

As the intention of the Legislature in passing Act II of 1874 has been made the subject of argument before us, I think that, so far as it bears on the point for our decision in this appeal, it may be gathered from a consideration of the statement of Objects and Reasons and the Report of the Select Committee.

Now, in respect of the Act of 1874, we find no indication, either in the statement of Objects and Reasons or in the Report of the Select Committee as published in the Government Gazette, of any intention to modify the law as previously expressed in section 30 of the Act of 1867 and the Hindu Wills Act of 1870. The modification which it was intended to make and the objects to be attained are all explicitly set out. The original intention, as stated in the Objects and Reasons, was to amend the law on some points which do not touch this case. The Report of the Select Committee shows that other matters, also irrelevant to this case, were presented to them, and were accepted as desirable amendments. These are set out in the Report made by the Committee to the Legislative Council. The Report further shows that the Committee also considered that the law as thus amended and contained in the Act of 1867, and some small Acts amending that Act, should conveniently be consolidated. The passing of the Act of 1874 shows that this recommendation was accepted. There was no expressed intention to modify the previous law by extending the powers of the executor of a will of a deceased Hindu, or the powers of an Administrator-General to accept the duties and responsibilities of such an executor under deed executed to him. The position of such an executor as laid down by our Courts was no doubt known to the Legislature, and there is no indication of any deliberate intention to alter that position or to confer on him the powers to relieve himself from all the responsibilities of that office. No such intention can safely be inferred. We have further the fact that not only was section 5 of the Hindu Wills Act of 1870, which declares that nothing in that Act shall affect the rights, duties and privileges of the Administrator-General, allowed to remain unrepealed, but a similar provision was made by section

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

66 of the Act of 1874 to the effect that nothing in the Indian Succession Act, 1865, shall be taken to supersede or affect the rights, duties or privileges of the Administrator-General. Although by making section 179 of the Indian Succession Act applicable to the wills of Hindus, the Hindu Wills Act of 1870 declared that the executor or administrator of a deceased (Hindu) person is his legal representative for all purposes, and that all the property of the deceased person vests in him as such, it further enacted that nothing in that Act shall affect the rights, duties and privileges of the Administrator-General. The argument from the application of section 179 of the Indian Succession Act of 1865 to Hindu wills, that as the entire estate became vested in an executor or administrator, such person was competent under section 31 of Act II of 1874 to transfer to the Administrator-General by an instrument in writing all estate, effects and interests so vested in him, seems to me to be completely met by section 66 of that Act, which declares that nothing contained in the Indian Succession Act of 1865 (and therefore nothing in section 167 of that Act) shall be taken to supersede or affect the rights, duties and privileges of the Administrator-General. If therefore before the enactment of Act II of 1874 the executor or administrator under a Hindu will had not the power of transfer, and in my opinion he had not, the terms of section 66 of that Act show that it was not intended to give him that power by reason only of anything contained in section 179 or any other section of the Indian Succession Act of 1865. I am further of opinion that the passing of the Probate and Administration Act (V of 1881) has not altered the law in this respect. It is applicable to Hindus, but it must be read subject to the Hindu Wills Act, 1870, which by section 154 it has amended by repealing portions of it which made certain sections of the Indian Succession Act, 1865, applicable to Hindu wills, the reason for such amendments being that these sections appeared in the new Act. Still that Act must be read with section 5 of the Hindu Wills Act, and there is, I think, no valid reason for holding that it was intended by that Act to alter the law as expressed first in section 30 of Act XXIV of 1867 and as now expressed in section 31 of Act II of 1874, read with section 5 of the Hindu Wills Act, and as

further explained by section 66 of the Act of 1874. There is also much force in the argument of the learned Advocate-General who draws attention to the fact that in the case of the will of a Hindu, save under exceptional circumstances, such as waste, the Administrator-General cannot take out letters of administration, although if appointed executor by the will, he can obtain probate, and that therefore it is not likely that the Legislature should have intended that he should by the act of an executor do what he could not ordinarily do. It is remarkable that in sections 17 and 18 of Act XXIV of 1867, and in the corresponding sections 17 and 18 of Act II of 1874, it should be specially provided that these sections are applicable to the general community, whether the person whose assets are dealt with is a Hindu, Mahomedan, Buddhist or not, and that section 16 of the Act of 1867 and the corresponding section 16 of Act II of 1874 especially exempt persons of that description, while both section 30 of the former Act and the corresponding section 31 of the Act of 1874 do not either expressly include or exempt such persons.

For these reasons I am of opinion that the construction of the law expressed by Mr. Justice Sale is correct, and this appeal should be dismissed with costs.

TREVELYAN, J.—Nundo Lall Mullick died on the 22nd of February 1891, leaving property in Calcutta. He left a will dated the 5th of August 1889. The executors of this will took out probate on the 17th of March 1891, and on the 14th of August 1893 executed a deed by which they purported, under section 31 of Act II of 1874 (the Administrator-General's Act), to transfer all estates, effects and interests vested in them by virtue of the probate to the Administrator-General of Bengal.

The only question before us is whether this transfer is a valid one, or, in other words, whether the executor of a Hindu testator has power to transfer the property of the testator to the Administrator-General under the terms of section 31 of Act II of 1874. This question has been argued before us with great care and ability, and it is to my mind a question of very great importance.

Counsel for the Administrator-General has informed us that in eight cases the estates of Hindus and Mahomedans have been trans-

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

ferred to the Administrator-General, such transfers purporting to be made either under section 31 of Act II of 1874 or under the corresponding section of the former Administrator-General's Act, *viz.*, Act XXIV of 1867. Of these cases, one was the transfer of the estate of an intestate Mahomedan, to whose case the considerations referred to in this judgment would have no application. Of the seven Hindu cases one was a transfer of letters of administration; of the other six cases four were the transfers of the probates of wills made before the Hindu Wills Act; the remaining two were transfers of probates which had been granted on the 21st January 1882, and 11th December 1884 respectively. If in a large number of cases the estates of Hindus and Mahomedans had, since a power of transfer was given by the Act of 1867, been transferred to the Administrator-General, it might have been said that this practice threw light on the construction of the Act; but it is clear that there cannot be said to have been anything like a practice. Eight cases only in nearly 27 years would not amount to anything approaching a practice, and, if anything, the small number of transfers would rather show that the view which the Administrator-General now contends for has by no means been generally accepted. We have no information at all as to what portion of the business of the office of Administrator-General has been connected with these estates. We have been referred to three suits in connection with these estates. In two of them the Administrator-General was a party, but no question of the kind which we have now to decide was raised. I think it clear that we must come to the determination of this question without considering these transfers in any way.

The words that we have to construe are as follows: "*Any private executor* or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing under his hand, notified in the local Gazette, transfer all *estates, effects and interests vested in him by virtue of such probate* or letters to the Administrator-General by his name of office."

One of the means by which a Court is entitled to seek assistance in construing the Acts of the Legislature is by referring to

the previous history of the law and legislation on the subject. As Sir George Jessell, M. R., puts it in *Holme* v. *Guy* (1): "Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the. Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as to carry out that object and no other, and to read the section with a view to finding out what it means and not with a view to extending it to something that was not intended."

In construing the Acts which we have to deal with here, we must also remember that the Legislature is to be assumed to be aware of, and to have in contemplation, the existing law upon the subject. Therefore it is in this case necessary to see what the law was at the time when the Act of 1874 was passed, that being the Act under which the transfer now in question was made.

In my opinion, the question which we have to determine can be conveniently sub-divided as follows: (1) What was the position of the executor of a Hindu prior to the passing of the Administrator-General's Act of 1867? (2) Did section 30 of that Act apply to the executors of Hindus? (3) Did the Hindu Wills Act alter the construction of section 30 of the Administrator-General's Act of 1867 and make that section applicable to Hindus? (4) Has section 31 of the Administrator-General's Act of 1874 altered the law which existed at the time it was passed.

I may here point out that so far as it has any bearing on the present question, the words of section 30 of the Act of 1867 are the same as those of section 31 of the Act of 1874.

I think there can be no doubt as to what was the position of the executor of a Hindu at the time that the Act of 1867 was passed. He was, unless greater powers had been given him by the will, merely a manager having no greater powers under the Hindu law than the *kurtah* of a joint family or the guardian of a minor property. The grant of probate by the Court vested nothing in him. The law on this subject is stated by Sir Henry Maine in his statement of Objects and Reasons for the Bill,

(1) L. R., 5 Ch. D., 905

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

which afterwards became the Hindu Wills Act, as follows: "Then the native executor takes nothing from any grant of the Court. His title is founded solely on the will considered as an instrument of gift."

In *Sharo Bibi* v. *Baldeo Das* (1) Norman, J., at page 26 of the report, says: "As regards a person appointed as executor of the will of a Hindu his position is different. He takes nothing from any grant of the Court. His title is founded solely and simply on the will of the testator, considered as an instrument of gift." In the case of *Jaykali Debi* v. *Shib Nath Chatterjee* (2) Phear, J., says at page 4 of the report: "I suppose it is now clear that probate does not confer upon the executor of a Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority, but these are all he can claim. At any rate this doctrine seems to have been laid down with regard to immoveable property in the case of *Sreemutty Dossee* v. *Tara Churn Coondoo Chowdhry* (3), by which I readily admit myself bound to be guided." The case of *Sreemutty Dossee* v. *Tara Churn Coondoo Chowdhry* was decided before the Administrator-General's Act of 1867 was passed. In the well known case of *Kherodemoney Dossee* v. *Doorgamoney Dossee* (4) Markby, J., (at page 468 of the report) says: "With regard to the first contention, there is no doubt that 'vest' is not an appropriate word to describe the position of a Hindu executor in a will made prior to the Wills Act. It has been frequently held that the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and that if, as executor, he is entitled to hold the property, he holds only as manager."

Probate vested nothing. The practice of granting probate grew up as a convenient form of establishing the *factum* of the will in Court. These decisions, which all referred to wills made

(1) 1 B. L. R., O. C., 24.
(2) 2 B. L. R., O. C., 1.
(3) Bourke, A. O. C. 48; 3 W. R. Mis. 7 note.
(4) I. L. R, 4 Calc., 455.

before the Hindu Wills Act came into force, show unmistakeably what has been considered to be the law applicable to the wills of Hindus before the passing of the Hindu Wills Act. The Legislature in giving the probates granted to representatives of Hindus before Act XX of 1841 came into force, the effect of certificates for the purpose of recovery of debts, recognized the limited character of probates which had been granted by the Supreme Court. Section 14 of that Act is as follows: "And it is hereby declared and enacted that all probates and letters of administration granted by any of Her Majesty's Courts in cases in which any assets belonging to the deceased persons were at the time of their deaths within the local jurisdiction of the Court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, but for the purpose of the recovery of debts only, and the security of debtors paying the same, except so far as is in the Act provided." In this section "British subjects" is admittedly used in the limited sense of what we now call "European British subjects."

Having regard to these decisions, I think we must hold that until the passing of the Hindu Wills Act, probate vested nothing in the executor of a Hindu, and that accordingly the phraseology of section 30 of the Act of 1867 was wholly inappropriate in the case of the executor of a Hindu. It follows, I think, that we must hold that in enacting section 30, the Legislature did not intend to apply it to probates of Hindu wills. In all probability the phraseology of section 30, which was then an entirely new enactment, was chosen with regard to the provisions of the Indian Succession Act, which had been passed two years before and which did not apply to either Hindus or Mahomedans.

The next question is whether the provision of the Hindu Wills Act had the effect of applying section 30 of the Administrator-General's Act of 1867 to Hindus. By the Hindu Wills Act, section 2, embodying section 179 of the Indian Succession Act, the executor of the deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. The second section also embodied the 187th section of the Indian Succession Act, which was as follows: "No right as execu-

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

tor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the one hundred and eightieth section."

Section 5 of the Hindu Wills Act is as follows: "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay, respectively." The rights, duties and privileges of the Administrator-General were then contained within the four corners of the Act of 1867, and that Act related to nothing else. I think that the reasonable construction of section 5 of the Hindu Wills Act is that the provisions of the Administrator-General's Act were to remain as if the Hindu Wills Act had not been passed. The ordinary grammatical meaning of the word "affect" is to act upon, or to produce an effect upon. In some Statutes it may appear from the context, that "affect" means "act injuriously upon." But in the Hindu Wills Act there is nothing in the context to give it such a qualified meaning. I think also that in construing this section it is proper to take into consideration the argument that it is unreasonable to suppose that the Legislature would have by implication, and not by express words, so largely increased the operation of section 30 of the Administrator-General's Act of 1867, and thus have made such a radical change in the powers of the executors of a large number, in fact the majority, of the inhabitants of this country. The Legislature was then by the Hindu Wills Act adding in express terms to the power of Hindu executors. If they had intended to add the further, and that a most important, power of transferring the property of testators to the Administrator-General, they would have done so in express words. I think we must hold that the Hindu Wills Act did not alter the construction of section 30 of the Administrator-General's Act of 1867, and did not make that section applicable to Hindus.

There remains the fourth question. As I have said before section 31 of the Act of 1874 is identical in words with section 30 of the Act of 1867. So the position is reduced to this: The Legislature knowing, as I must take it they did, that section 30 of the Act of 1867 had no application to Hindus, even at the

time when the Act of 1874 was under their consideration, re-enacted section 30 in identical terms ; therefore it follows, I think, that the new section was intended to apply to the same persons as the old section, even after the passing of the Hindu Wills Act referred to. I think this is a necessary inference from the identity of terms. If the Legislature had intended that section 31 should give to the executors of Hindus powers which they did not possess when it was enacted, they would have said so. Again here, in seeking to discover the intentions of the Legislature, I think I am right in assuming that they would not by implication have introduced such a radical change in the law.

There is not in the Act of 1874 any indication that the Legislature intended that section 31 of that Act should bear a different construction from section 30 of the Act of 1867. Furthermore in construing the Act of 1874, I think that section 5 of the Hindu Wills Act precludes us from considering the change made in the position of the executor of a Hindu will by the Hindu Wills Act. In my opinion for these reasons section 31 of the Administrator-General's Act of 1874 did not alter the law which existed at the time it was passed. Reference was made during the argument to the Probate and Administration Act of 1881, but in the first place the terms of section 148 of that Act prevent its application to this case, and in the second place it is difficult to see how it can throw any light on the earlier Act of 1874.

We were referred during the argument to the history of the Act of 1874 in its transition through the Legislature. Although the Courts here have sought to find assistance from sources of this kind, I have personally always felt the danger of depending to any substantial extent upon any such aid to the construction of an Act of the Legislature. As pointed out in page 105 of Wilberforce on Statutes, such a reference is inadmissible in England. But in this country reference has frequently been made to sources of this sort, and in the comparatively recent Full Bench decision of *Queen-Empress* v. *Kartick Chunder Das* (1) the judgment depended in the main on the Report of a Select Committee. The Full Bench judgment contains the following passage : "But we thought it right from

(1) I. L. R., 14 Calc., 721.

1894

THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK.

the proceedings of the Legislative Council at the time this measure was in preparation to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Court here in recent times; and in a case of such difficulty and importance as this appeared to be, we felt bound to adopt it." All I need say is that, if such a reference were admissible, what was shown to us would incline me to the same construction as that which I have put upon the Act without such reference. I agree with the opinion expressed by Mr. Justice Sale in the Court below and consider that this appeal should be dismissed with costs.

Appeal dismissed.

Attorney for the appellant: Mr. *Carruthers.*

Attorney for the respondent: Babu *G. C. Chunder.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1894 *April* 24.

GOPI NATH MASANT AND OTHERS (PLAINTIFFS) *v.* ADOITA NAIK AND OTHERS (DEFENDANTS), AND OTHERS, MINORS, REPRESENTED BY THE COURT OF WARDS (PLAINTIFFS.) *

Second Appeal—Bengal Tenancy Act, Chapter X, sections 104 clause 2, 106, 107, 108 clause 2—Dispute as to entries in record of rights—Question as to status of ryots—Order of special Judge on appeal from Settlement Officer—Civil Procedure Code, section 622.

Under Chapter X of the Bengal Tenancy Act there is to be (1) a framing of the record of rights, (2) a draft publication for a period of one month during which time objections may be preferred, and (3) a final publication, previous to which publication "disputes" as to the correctness of the entries in the record of rights, other than entries of rents settled, are to be heard and decided. Under section 107 the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of decrees, and under section 108, clause 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer; but it is only in cases under section 106 decided by the Special Judge on appeal from the Settlement Officer that a second appeal

* Appeal from Appellate Decrees Nos. 2148 and 2149 of 1892 against the decree of J. Pratt, Esq., Special Judge of Midnapore, dated the 1st of September 1892, reversing the decree of Babu Rajendra Nath Bose, the Settlement Officer of Midnapore, dated the 8th December 1891.

lies to the High Court, and such cases can only relate to disputes regarding the correctness of entries other than the entries of rent settled.

Where a decision of the Settlement Officer in a case under section 104, clause 2 of the Act dealt with the question of the *status* of the ryots, and was passed before the record had been framed; and after the record had been framed there was no dispute as to correctness of any entry, except the entries of the rent settled: *Held*, that the order of the Special Judge on appeal from such decision of the Settlement Officer was not one passed in a case under section 106, and therefore no second appeal lay from it to the High Court.—*Shewbarat Koer* v. *Nirpat Roy* (1) and *Lala Kirat Narain* v. *Palakdhari Pandey* (2) referred to.

Held, also, that the case was not one which required the interference of the High Court under section 622 of the Civil Procedure Code.

THE suits out of which these appeals arose were brought under section 104, clause (*d*) of the Bengal Tenancy Act, for settlement of the rent and for determination of the *status* of the ryots. The plaintiffs claimed at different rates for the various classes of land, which varied from Rs. 1 to Rs. 8 per *bigha* for the year. The defendants who appeared, on the other hand, alleged that they were paying at a rate which gave an average of Re. 1-8 per *bigha* for the year, or Rs. 6-4 per 4 *bighas* 5 *cottahs* 12 *chittacks*. Some of the cases were heard *ex parte*. The Settlement Officer fixed the following issues: (1) What are the fair rents? (2) What is the *status* of defendants? And after dealing with the evidence, oral and documentary, which was brought before him, he, on the 8th December 1891, decided the first issue in favour of the plaintiffs' contention, and the second issue, as to the *status* of the defendants, in favour of the defendants, and held that this decision should govern the *ex parte* cases as well as those which were contested.

Subsequently on 19th February 1892 another proceeding was held by the Settlement Officer at which he took some further evidence, and made the following order:—

"It appears to me that certain lands in the *khatian* have been assessed at the rates for the higher classes of lands, and that all tanks have been assessed at Rs. 8 the *bigha* when the rates vary from Re. 1 to Rs. 8. Ordered that the mistakes made should be corrected—"

thereby altering the rates fixed by him on 8th December 1891.

Appeals were filed from these orders by the tenants (defendants) from that of 8th December 1891, and by the landlords (plaintiffs)

(1) I. L. R., 16 Calc., 596. (2) I. L. R., 17 Calc., 326.

1894

GOPI NATH MASANT v. ADOITA NAIK.

from that of 19th February 1892, and were heard by the Special Judge. He came to the conclusion on the defendants' appeals that "on the materials before him the Settlement Officer was not justified in deciding the rates as he did, and so the appeals of the tenants must prevail." As to the order of 19th February 1894 the Special Judge held that it was *ultra vires*, and that the appeals in respect of it must be allowed. He said :—

"The result is that all the appeals are allowed ; the Settlement Officer's assessment and revised assessment are set aside, and matters must remain as they were ; the record of rights, so far as regards the rents payable by each tenant, being declared null and void. I have no proper materials on which to determine what ought to be the rents or rates of rent. If the landlords desire further enquiry they will have to pay for it. It will no longer be open to them to adduce evidence as to existing rates ; the enquiry would be directed to ascertaining fair rents. All parties to pay their own costs of these appeals."

From this decision the plaintiffs appealed to the High Court.

Mr. *Jackson* and Babu *Debendro Nath Ghose* for the appellants.

Baboo *Umakali Mukerjee* and Baboo *Srish Chunder Chowdhry* for the respondents.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

The facts of these cases have not been fully or clearly stated by the lower Courts. It has, therefore, been very difficult for us to understand what has actually taken place.

We find, however, that there were two suits, Nos. 42 and 43, under section 104 *(d)* of the Bengal Tenancy Act brought before the Settlement Officer of Midnapore on the 26th September 1891.

The plaintiffs in these suits were (1) the Masants who were cosharer-landlords to the extent of 13 annas in respect of the lands held by the defendants ; and (2) the Court of Wards who represented two minors who were the cosharer-landlords of the remaining 3 annas share. The defendants in suit No. 42 were 119 ryots, and in suit No. 43 were 311 ryots of the *mouzahs* Maguri and Jagannathchak, *pargana* Kashijora.

The parties in the proceedings before the Settlement Officer were at issue as to two points : (1) as to the *status* of the defendants, and (2) as to the rates of rent payable by them. The

Settlement Officer, by his decision of the 8th December 1891, gave the first point in favour of the defendants, and the second in favour of the plaintiffs.

We have been told that subsequently on the 10th December 1891, the Settlement Officer issued a notice, under rule 33 of the Government rules under the Tenancy Act; that on the 10th January 1892 he published the draft *khatian;* that on the 11th *idem* he issued a notice under rule 34; and on the 18th February 1892 he finally published the *khatian* or record of rights. Then on the 19th February 1892, that is, the day after the final publication of the *khatian*, he recorded the evidence of one Aftabuddin Mahomed, manager under the Court of Wards, who said that the lands had been assessed at rates higher than the ryots would be able to pay, upon which on that date, the 19th, and the following date, the 20th, he reduced the assessment on tanks and *dobas* to Re. 1 instead of Rs. 8 as before.

Meantime, on the 2nd February 1892, both the Masant landlords and certain of the defendants had appealed to the Special Judge.

The Masant landlords' appeals were numbered 236 and 237, and the tenants' appeals were numbered 119 and 120. But the Court of Wards did not appeal on behalf of the minors, and out of the 311 defendants in suit No. 43 only 45 appealed.

We have not been told how many of the defendants out of the 119 defendants in suit No. 43 have appealed in special appeal No. 2149, and on the view of the case which we take this point is not material.

The Special Judge decreed all the appeals. He held the revised assessment by the Settlement Officer on the 19th and 20th February to have been *ultra vires*, and he set it aside. He also set aside the assessment of the 8th December 1891, and declared that the record of rights as regards the rent payable by each tenant was null and void. He further ordered that "if the landlords desire further enquiry they will have to pay for it. It will no longer be open to them to adduce evidence as to existing rates. The enquiry would be directed to ascertaining fair rents."

Two further facts remain to be noted, *viz.*, (1) that on the 25th November 1892, an application in respect of this matter was made to this Court under section 622 of the Civil Procedure

1894

GOPI NATH MASANT v. ADOITA NAIK.

Code, but was rejected by Tottenham and Ameer Ali, JJ.; and (2) that on the 14th December 1892, the Masant plaintiffs applied to the Settlement Officer for a re-enquiry, apparently in pursuance of the Special Judge's order of the 1st September 1892.

Now, the Masant plaintiffs appeal to this Court in special appeals Nos. 2148 and 2149, and urge—(1) that the order of the Special Judge was wrong, inasmuch as it set aside the Settlement Officer's decree, not only as against the defendants who appealed to him, but as against the remaining defendants who did not appeal, including 6 (Nos. 1, 17, 106, 117, 124 and 282), who, it is said, admitted the rates of rent claimed from them by the plaintiffs; and (2) that as regards the tenants who did appeal, their appeal was not ripe for hearing and should not have been heard by the Special Judge.

On the other hand, on behalf of the respondents, *i.e.*, the whole of the defendants, who have all been made respondents, a preliminary objection is urged to the effect that no appeal lies, as the decision of the lower Appellate Court deals with the question of the rate of rent only and with no other question.

We must dispose of this preliminary objection in the first instance, and it seems to us that we must give effect to it. No doubt, as has been contended by the learned Counsel for the appellants, the decision of the Settlement Officer of the 8th December 1891 disposed of a question of the ryots' *status* as well as of the question of the rates of rent payable by them, but we do not think that there was any "dispute" on this point within the meaning of section 106 as between the parties so as to give a right of second appeal to this Court.

It must be admitted that the provisions of Chapter X of the Bengal Tenancy Act are somewhat obscure as regards the procedure to be followed in cases under the chapter; but, as far as we understand them, there is to be (1) a framing of the record of rights; (2) a draft publication for a period of one month, during which time "objections" may be preferred; and (3) a final publication, previous to which publication "disputes" as to the correctness of the entries in the record of rights other than entries of rents settted are to be heard and decided.

Under section 107 the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of a decree, and under section 108, clause 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer. But it is only in cases under section 106 decided by the Special Judge that a second appeal lies to this Court, and such cases can only relate to disputes regarding the correctness of entries other than entries of rent settled.

Now, it is clear that the decision of the Special Judge appealed against in the present cases was not passed in cases under section 106. The decision of the Settlement Officer of the 8th December 1891 was the only one which dealt with the question of the *status* of the ryots. This was no doubt a decision in a proceeding under Chapter X, but it was not a decision in a case under section 106. It was passed before the record had been framed. After the record had been framed there was no dispute as to the correctness of any entry except the entry of the rent settled, and hence it seems to us no second appeal lies to this Court. See the cases of *Shewbarat Koer* v. *Nirpat Roy* (1) and *Lala Kirat Narain* v. *Palukdhari Pandey* (2), which have been followed in several unreported cases (3).

We have been asked if in our opinion no appeal lies in these cases to deal with the memoranda of appeal as if they were applications under section 622, Civil Procedure Code. But we cannot do so for the reason that an application under section 622 with regard to this matter has already been rejected by this Court, *viz.*, on the 25th November 1892. Circumstances have not altered since that application was refused, and from any point of view we do not think that this is a case in which the ends of justice require that we should interfere under section 622.

We therefore dismiss these appeals.

This order will direct that the appellants do pay the costs of the respondents.

J. V. W. *Appeals dismissed.*

(1) I. L. R., 16 Calc., 596. (2) I. L. R., 17 Calc., 326.

(3) Sp. Ap. 719 of 1890 decided by TOTTENHAM and TREVELYAN, JJ., on 17th April 1891: Sp. Ap 710 of 1891 decided by TOTTENHAM and GHOSE, JJ., on 17th February 1893; Sp. Ap. 2002 of 1892 decided by TREVELYAN and RAMPINI, JJ., on 22nd February 1894; and Sp. Ap. 308 of 1893 decided by AMEER ALI and RAMPINI, JJ., on 29th March 1894. *Rep note.*

CRIMINAL REFERENCE.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

1894
April 27.

QUEEN-EMPRESS ON THE PROSECUTION OF THOMSON *v.* GUNNING (ACCUSED).*

Jurisdiction—Offences committed on the High Seas—Trial of British Seaman for offence committed on a British Ship on the High Seas—Procedure at such Trial—Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104), sec. 267—Merchant Shipping Act, 1855 (18 and 19 Vic., c. 91), sec. 21—Courts (Colonial) Jurisdiction Act, 1874 (37 and 38 Vic., c. 27).

The trial of a British seaman for an offence committed on a British ship on the High Seas must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law.

THIS was a reference by the Chief Presidency Magistrate under the provisions of section 432 of the Code of Criminal Procedure, and it was in the following terms :—

"EMPRESS on the prosecution of HENRY THOMSON, Steward of the British Ship "Lord Brassey" *v.* CAPTAIN GUNNING, Master of the said ship.

"SIR,—I have the honour to refer the following under the provisions of section 432 of the Code of Criminal Procedure for the opinion of the High Court.

"2. The accused in the above case is charged under sections 323 and 504 of the Indian Penal Code with having, during the month of October last, voluntarily caused hurt to the complainant, and intentionally insulted and thereby given provocation to him, intending or knowing it to be likely that such provocation would cause him to break the public peace on board the British ship "Lord Brassey" while on the high seas. The question arising is :—

"Whether the accused must be tried under the English law or whether he can be tried under the Indian Penal Code.

"I would call their Lordships' attention to *Queen-Empress* v. *Abdool Rahiman* (1) and *Queen-Empress* v. *Barton* (2).

The *Standing Counsel* (Mr. *Phillips*) appeared on behalf of the Crown.

The accused was not represented.

Mr. *Phillips.*—The accused in this case is charged under sections 323 and 504 of the Indian Penal Code. The allegation is that these offences were committed in the month of October last on board the British ship "Lord Brassey" while on the High Seas. The question for determination is whether the accused must be tried

* Criminal Reference No. 1 of 1894, made by F. J. Marsden, Esq., Chief Presidency Magistrate, Calcutta, dated the 28th of March 1894.

(1) I. L. R., 14 Bom., 227. (2) I. L. R., 16 Calc., 238.

under the English law or the law as it is administered in this country, *i.e.*, under the Penal Code.

I submit that according to the cases in this Court the offence must be an offence under the English law, but the trial must be conducted under the Code of Criminal Procedure, and the punishment must be also regulated by local law. With regard to the first point, it is clear that if the accused is guilty of any offence, it is by reason of the general Admiralty Jurisdiction, or under 17 and 18 Vic., cap 104, section 267, or 18 and 19 Vic., cap. 91, section 21: see the case of *The Queen* v. *Anderson* (1); see also 12 and 13 Vic., cap. 96, section 1. This statute was extended to India by 23 and 24 Vic., cap. 88, section 1. The statute was discussed in *The Queen* v. *Thompson* (2). It was held (see page 9 of the report) that the offence was punishable according to English law, and also that the substance of the offence must be one recognized by English law. In that case, however, the accused was not charged as a British seaman or as a British subject, but as a person who was in a British ship. The provisions of the enactments above mentioned were extended to all persons on a British ship by 30 and 31 Vic., cap. 124, sections 2 and 11.

The other cases on this subject are: *Reg.* v. *Elmstone* (3), and *Queen-Empress* v. *Barton* (4). In the first of these cases it was laid down that the procedure applicable in such cases is the ordinary Criminal Procedure of this country. That case however lays down that the law of England is to be regarded as the law of India as regards punishment. The case of *Queen-Empress* v. *Barton* (4) also decides that the trial is to be held according to the Criminal Procedure of this country.

The opinion of the High Court (O'KINEALY and HILL, JJ.) was as follows:—

This is a reference made by the Chief Presidency Magistrate for the town of Calcutta under section 432 of the Code of Criminal Procedure. In it he states that Henry Thomson, a steward of the British ship "Lord Brassey," charged Captain Gunning, master of the said ship, with offences committed on the high seas under sections 323 and 504, Indian Penal Code, and he asks whether

(1) L. R., 1 Cr. Ca., 161.
(2) 1 B. L. R., O. Cr., 1.
(3) 7 Bom. Cr., 89.
(4) I. L. R., 16 Calc., 238.

1894

QUEEN-EMPRESS v. GUNNING.

the accused must be tried under the English law, or whether he can be tried under the Indian Penal Code.

It would appear from the case of *Queen* v. *Anderson* (1), if Captain Gunning is guilty of any offence, it is because of the general Admiralty Jurisdiction or under 17 and 18 Vic., cap. 104, section 267, or 18 and 19 Vic., cap. 91, section 21. In each case the offence of which he must be tried is an offence under English law. In the case of *Reg.* v. *Mount* (2), a question arose not as to the nature of the offence but as to the amount of punishment that should be inflicted. All doubts on that point are now settled by 37 and 38 Vic., cap. 27. The answer, therefore, is that the trial must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law.

H. T. H.

PRIVY COUNCIL.

*P. C.**
1894
Feb. 28.

KISHORE BUN MOHUNT (OBJECTOR) *v.* DWARKANATH ADHIKARI AND OTHERS (PETITIONERS).

KISHORE BUN MOHUNT *v.* PROSONNOCOOMAR ADHIKARI.

[On appeal from the High Court at Calcutta.]

Execution of decree—Execution under section 260, Civil Procedure Code, Act XIV of 1882—Refusal of execution where opportunity to obey the decree had not been afforded by the decree-holders—Effect of such refusal—Subsequent order for execution

An order of a Court dismissed a petition for execution under section 260 of the Civil Procedure Code because the petitioning decree-holders had not then afforded to the judgment-debtor an opportunity of obeying the decree, which directed him to do specific acts. *Held*, (1), that another application, made after such opportunity had been afforded to him, was not barred as having been matter of prior adjudication within section 13 of the Civil Procedure Code; (2) that the decree which also declared rights on the part of the decree-holders against him was not incapable of being executed under section 260, on the objection that it was only declaratory.

Two appeals upon petitions for execution of a decree, dated 31st March 1881. The first appeal from an order (5th September 1890) of the High Court, reversing an order (30th March

* *Present:* LORDS MACNAGHTEN and MORRIS, and Sir R. COUCH.

(1) L. R., 1 C. C. R., 161. (2) L. R. 6 P. C., 283.

1889) of the District Judge of Chittagong, who had affirmed an order (25th May 1886) of the Munsif of Sitakund. The second appeal from an order (3rd December 1890) of the High Court, affirming an order (8th November 1889) of the Judge of the same district, varying an order (23rd March 1889) of the Munsif of the same place.

Two questions were raised on these appeals: In the first, whether the respondents were not precluded from asserting their right, as they did, to execute a decree under the 260th section, Civil Procedure Code, by a previous adjudication, within section 13; in the second, whether the decree, of which execution was sought, was not merely declaratory of a right, so that it was, therefore, incapable of being executed in the manner applied for under section 260.

The appellant was the *mohunt* of a religious institution, established in a temple, at which the respondents were *adhikara pandas*, or officiating priests. The latter claimed the right denied by the appellant to perform the religious service at the temple for a period in each year, and to receive a share of the offerings, *darshani*. On the 31st March 1881, a decree was made in their favour, and it was to the execution of this decree that both the appeals related. The respondents in the first appeal had, when this decree was obtained, joined with them as one of the co-plaintiffs, the father, Akhilchunder Adhikari, deceased in 1887, of the respondent in the second of these appeals, Prosonnocoomar Adhikari. This decree, made by the Munsif in Chittagong, declared the right of the plaintiffs as against Kishore Bun Mohunt, the defendant, now appellant, to have, for the purposes of performing the ceremonies, which they were entitled to perform, certain articles supplied to them by him, and a proportionate part of the offerings made over to them by him; and costs of the suit, with interest, were decreed. Execution of this decree was first applied for on the 10th August 1885, by arrest of the defendant, under section 260, Civil Procedure Code. The result was a refusal of the execution, by an order made on the 19th December 1887.

The orders made on appeal from this order, both in the District Court and on a second appeal to the High Court, appear, in their series, in their Lordships' judgment. While those proceedings were

1894

KISHORE BUN MOHUNT v. DWARKANATH ADHIKARI.

pending, Akhilchunder died in June 1867, leaving his only heir Prosonnocoomar Adhikari, the respondent in the second appeal. The latter filed his own petition under section 260 for execution of the decree of 31st March 1860, on the 25th November 1887; the defendant, now appellant, objecting among other objections that the decree being merely declaratory could not be executed in the manner provided by section 260. These objections were disallowed, and the execution under that section was ordered by the Munsif on the 1st March 1888. The District Judge affirmed substantially this order, with a slight alteration as to the articles to be supplied. But on the 24th August 1888, on a second appeal, preferred to the High Court, a Divisional Bench ordered execution to issue in the usual way.

Afterwards, on the 13th February 1889, the respondent Prosonnocoomar made the application for execution, which, after proceeding to the High Court on appeal, and being then disposed of in his favour, led to the present appeal. The execution ordered was under section 260 of the Civil Procedure Code.

On these appeals—

Mr. *R. V. Doyne* for the appellant argued that, on the first of the two appeals, the High Court had not given due effect to the order of the 19th December 1887, which, as a prior adjudication, had barred the subsequent order. In reference to the other appeal, he relied on the declaratory nature of the decree of the 31st March 1881.

The respondents did not appear.

Their Lordships' judgment was delivered by :—

LORD MORRIS.—Both these appeals have been argued before their Lordships *ex parte*.

In the appeal of *Kishore Bun Mohunt* v. *Dwarkanath Adhikari* and others a judgment of the High Court at Calcutta is impeached, which reversed a judgment of the District Judge of Chittagong, who had upheld, with a variation, a judgment of the Munsif of Sitakund.

The facts of the case are shortly as follows: In the year 1880 the respondents, who are officiating priests in the temple of a deity called Sumbhu Nath Deb, instituted a suit in the Munsif's Court against the appellant for the purpose of establishing their right

to perform certain offices at the shrine and to receive certain offerings from the votaries. On the 31st March 1881 a decree was made by the Munsif, by which the claim of the respondents was allowed, and the appellant was ordered to deliver to the respondents certain articles necessary for the performance of the offices in question, and the right of the respondents to the offerings claimed was decreed. This decree was not complied with, and in the year 1885 respondents applied to the Munsif for leave to execute it under section 260 of the Civil Procedure Code. The appellant contended that the decree was merely declaratory and was not capable of execution as prayed.

Section 260 provides as follows: "When the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for the performance of or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both."

The Munsif gave judgment on the 25th May 1886, ordering the decree to be executed. There was an appeal from the Munsif to the District Judge of Chittagong, who, on the 24th March 1887, modified the Munsif's judgment, and directed the decree to be executed in part only. Both parties appealed to the High Court, and the High Court, on the 19th December 1887, delivered judgment in these terms: "The order of the lower Court appealed against in the appeal from Appellate Order No. 112 of 1887 will be set aside, and that appealed against in the appeal from Appellate Order No. 194 of 1887 will stand confirmed. We express no opinion as to whether or not the decree is capable of execution."

On the 1st February 1888 the respondents again petitioned the Munsif for execution of the decree, stating in their petition that they had, since their first action, served the appellant with notice, and had presented themselves at the temple at certain times specified in the notice, in order that they might be allowed the opportunity of performing a certain ceremony, and receiving certain articles necessary for its performance, and so afford the appellant an opportunity of complying with the decree.

1894

KISHORE BUN MOHUNT v. DWARKA-NATH ADHIKARI.

The appellant did not supply the articles in question, and objected to the petition on the ground that it was barred as being *res judicata*. The Munsif held that the matter was *res judicata* and dismissed the petition. The respondents appealed to the District Judge of Chittagong, who affirmed the decision of the Munsif on the question of *res judicata*, while reversing it in another respect. Both sides appealed to the High Court, who reversed the decision of the District Judge, and declared that the respondents were entitled to enforce their decree under section 260 of the Civil Procedure Code, and ordered execution to issue accordingly.

The High Court pointed out in their judgment that their decree in the first suit was only intended to determine that the particular application for execution, then the subject of appeal, could not be allowed. The respondent had not at that time placed themselves in the position of having the right to have their decree executed, inasmuch as they had not given notice to the appellant, and so afforded him an opportunity of complying with it. They had not gone to the temple so as to be ready to receive the articles necessary for the performanee of the ceremony if they were offered to them. That matter of fact distinguished the second suit entirely from the first.

It is therefore quite plain, in their Lordships' opinion, that the question was not *res judicata*. The Lordships think that the respondents were properly non-suited in the first action, because they had not then shown that there was a demand made by them on the appellant, and an opportunity thus given him of complying with the decree. In the second action they remedied this defect, and stated in their petition that they had given the appellant notice of their demand, and had duly presented themselves at the temple. The appellant in his petition of objection does not deny this, merely taking tne formal objection that the notice was illegal and improper; but the fact of the notice having been given, and of the respondents having presented themselves at the temple in pursuance of it, was never denied, and was, in fact, taken for granted throughout the trial. Indeed, those fresh facts constituted the difference between the two actions.

1894

KISHORE BUN MOHUNT v. DWARKA-NATH ADHIKARI.

An objection was taken on the part of the appellant before their Lordships that the notice was not properly before the High Court, and that the High Court was not warranted in assuming its existence. But it is necessary, in considering such an objection, taken at so late a stage, to look carefully at the proceedings in the Courts below ; and it is clear to their Lordships that throughout the whole course of the trial the fact of the notice having been given was admitted.

On these grounds their Lordships are clearly of opinion that the judgment of the High Court should be affirmed, and they will humbly advise Her Majesty accordingly.

In the appeal of *Kishore Bun Mohunt* v. *Prosonnocoomar Adhikari*, the question of *res judicata* does not arise at all ; but it is said that the decree was merely a declaratory one, which could not be executed under section 260 of the Civil Procedure Code. Their Lordships have no doubt that it is a decree which can be executed, and that the High Court were right in dismissing the appeal from the District Judge who had directed the execution to issue. Indeed, it has not been substantially argued that if the first appeal fails this appeal can succeed.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal. *Appeal dismissed.*

Solicitors for the appellant : Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Rampini.

BHAGBUT LALL (DECREE-HOLDER, AUCTION-PURCHASER) *v.* NARKU ROY (JUDGMENT-DEBTOR.)*

1894 *April* 2.

Second appeal—Order setting aside sale under section 294, Civil Procedure Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civil Procedure Code, 1882, sections 244, 588.

No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under section 294 of the Civil Procedure Code, notwithstanding that section 244 bars a separate suit in such a case ; that section (244), whilst it precludes a right of suit, does not enlarge the right of appeal, which is limited strictly by section 588.

* Appeal from order No. 201 of 1893, against the order of J. Kelleher, Esq., District Judge of Sarun, dated 11th of April 1893, reversing the order of Babu Upendro Nath Bose, Munsif of Chupra, dated the 21st of January 1893.

1894

BHAGBUT LALL v. NARKU ROY.

IN this case Bhagbut Lall had obtained a decree against Narku Roy, in execution of which certain property of the judgment-debtor was sold and was purchased by the decree-holder for Rs. 40. An application was thereupon made by the judgment-debtor to have the sale set aside on the grounds that the decree-holder had not obtained permission to bid for and purchase the property; and that there had been irregularity in the conduct of the sale which had resulted in the property being sold for an inadequate price, and consequent substantial injury to the judgment-debtor.

The Munsif found that there had been no irregularity in the conduct of the sale, and that the price for which the property was sold was not inadequate. He held, moreover, that though there was nothing on the record to show that permission was given to the decree-holder to purchase, yet there was sufficient evidence to show that he had such permission. He therefore rejected the application. On appeal the Judge reversed the Munsif's decision on the ground that the finding as to inadequacy of price was founded on insufficient materials, and that the decree-holder had purchased the property without permission. The sale was therefore set aside.

The decree-holder appealed to the High Court.

Mr. *C. Gregory* and Babu *Boykunt Nath Dass* for the appellant.

Babu *Aubinash Chunder Banerjee* and Babu *Makhun Lall* for the respondent.

The objection was taken that no appeal lay.

The judgment of the Court (AMEER ALI and RAMPINI, JJ.) was as follows:—

The question involved in this appeal is extremely simple, although a considerable time has been occupied in its argument. The decree-holder appears to have purchased the property belonging to his judgment-debtor in execution of his decree. The judgment-debtor applied to have the sale set aside on various grounds—amongst others on the ground that the decree-holder had purchased the property without obtaining the permission of the Court. The Munsif before whom this application was made rejected it. On appeal the District Judge has, on the ground that the purchase was made by the decree-holder without the permission of the Court, set aside the sale. So far as the question of permission is concerned, whether the permission was

obtained or not, the finding of the learned Judge is one of fact into which we cannot enter. The decree-holder has appealed to this Court, and an objection has been taken on behalf of the respondent that no second appeal lies from the order of the District Judge under section 294. Mr. Gregory who appears for the appellant has argued that the question between the parties falls under section 244, and therefore, independently of any provisions in the Code and irrespective of section 294, he has a right to a second appeal. Now, section 294 provides that no holder of a decree, in execution of which property is sold, shall, without the express permission of the Court, bid for or purchase the property, and clause 3 of that section provides that when a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale. Section 588, clause 16, gives an appeal from orders under section 294, and the last clause of section 588 provides that an order passed in appeal under this section shall be final. Therefore, unless the matter comes under any other provision of the Code, it is clear that there is only one appeal and no more. Section 244, referred to as justifying the second appeal, declares that all questions arising between the parties to a suit in execution should be dealt with by orders of the Court executing the decree and not by a separate suit, and the case of *Viraraghava* v. *Venkata* (1), to which Mr. Gregory has referred, shows that in a case when an order is made under section 294 the judgment-debtor cannot proceed by separate suit, because the matter falls under section 244; but that case does not show that section 244 enlarges the right of appeal, which is restricted by section 588. It is clear that section 588, clause 16, is restrictive in its character, and gives one appeal only to the parties aggrieved or dissatisfied with any order confirming, setting aside or refusing to set aside a sale of immoveable property. To suggest that because section 244 precludes a right of suit it enlarges the right of appeal is untenable and no authority is shown for it.

As at present advised we think that no second appeal lies from this order, and we therefore dismiss the appeal with costs.

J. V. W. (1) I. L. R., 16 Mad., 287. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris and Mr. Justice O'Kinealy.

1894
April 18.

RUSSICK LALL PAL (DEFENDANT) *v.* ROMANATH SEN (PLAINTIFF.) *

Transfer of Property Act (IV of 1882), section 135—Mortgage—Actionable claim—Assignment of Mortgage—Liability of Mortgagor—Steps to be taken by mortgager to obtain benefit of section 135.

A mortgage is an actionable claim under section 135 of the Transfer of Property Act.

In order to obtain the benefit of that section the mortgagor must pay "the price and incidental expenses, &c, with interest" into Court either in or before the action—*Muchiram Barik* v. *Ishan Chandra Chuckerbutti* (1) followed.

Where a mortgagor some months after suit was brought tendered the amount due, on the assignment of the mortgage to the assignee, and the tender was refused and no actual payment was made into Court: *Held* by PETHERAM, C.J, NORRIS and O'KINEALY, JJ, affirming the judgment of HILL, J.) that under the circumstances the mortgagor was not entitled to the benefit of section 135.

APPEAL from a decision of HILL, J., dated the 8th March 1892.

The suit out of which this appeal arose was a suit on a mortgage in English form, dated 20th September 1889, executed by the defendant Russick Lall Pal in his personal capacity, and by Russick Lall Pal and the defendant Preonath Sen as executor of the will of one Lalmoni Dasi, deceased, in favour of one Joggessur Sen, for the sum of Rs. 5,500. The plaint stated that this mortgage was on 27th July 1891 assigned by Joggessur Sen to the plaintiff; that on or about the 13th August 1891 the plaintiff, through his attorneys Messrs. Swinhoe and Chunder, called on the defendant to pay to him the amount due on the mortgage; and that thereupon the defendant Russick Lall Pal, through his attorney Mr. Dover, expressed his willingness to do so, and requested the plaintiff's attorney to furnish him with a statement of account showing the account due to the plaintiff in respect thereof; that the plaintiff's attorneys sent a statement of account showing the sum of Rs. 6,698-9-6 (being Rs. 5,500 for principal and Rs. 1,198-9-6 for interest)

* Original Appeal No. 12 of 1892.

(1) I. L. R., 21 Calc., 568.

then due on the mortgage. This not being paid the suit was brought on 2nd September 1891.

From the written statement of the defendant Russick Lall Pal which was filed on 6th March 1892, it appears that after the institution of the suit he first became aware that the sum of Rs. 6,200 only had been paid by the plaintiff on the assignment of the mortgage; that on 1st February 1892 he handed to the plaintiff the sum of Rs. 6,680 (being the sum of Rs. 6.200 with incidental expenses of the assignment and with interest on the price from the day the plaintiff paid it), but the plaintiff refused to accept it, stating that a sum of Rs. 8,067-1-1 was due to him from the defendant. The defendant Russick Lall Pal submitted that he was entitled to the benefit of the provisions of section 135 of the Transfer of Property Act, and that the said sum of Rs. 6,680 should have been accepted by the plaintiff in full discharge of the liability of the defendant under the assignment.

The defendants Russick Lall Pal and Preonath Sen on 23rd November 1891 filed a written statement in their capacity as executors of the will of Lalmoni Dasi, in which they denied any liability as such executors to the plaintiff under the mortgage. It appeared that Lalmoni Dasi died in May 1888 leaving a will made shortly before her death of which she made these two defendants the executors, and probate of the will had been granted to them as such executors; that by the will certain legacies were given and Rs. 4,000 directed to be set apart out of the estate for the support if an idol, and the defendant Russick Lall Pal was made residuary legatee; that after the legacies had been paid, the defendants as the executors assented to the bequest to Russick Lall Pal in consideration of his paying the sum of Rs. 4,000 to the executors to be held for the purposes and trusts directed by the will; that this sum was paid to them out of the consideration money for the mortgage, and that they as such executors joined in the mortgage for the purpose only of recording their assent, and of confirming to the mortgagee, at the request of Russick Lall Pal, and for the consideration so paid by him to them, the residue of the estate and property of Lalmoni Dasi comprised in the mortgage; and that out of the sum of Rs. 4,000, Rs. 3,500 was advanced to Russick Lall Pal by Preonath Sen as one of the executors of the will on the

1894

RUSSICK LALL PAL v. ROMANATH SEN.

security of a second mortgage executed by Russick Lall Pal in favour of Preonath Sen as such executor of all the property comprised in the mortgage of 20th September 1889.

The other material facts, as they appeared in the correspondence and other documentary evidence, are sufficiently stated in the judgment appealed from which was as follows :—

"This is a suit by the assignee of the mortgage for the enforcement of a mortgage in the English form bearing date the 20th September 1889. The suit is brought against one Russick Lall Pal, in his personal capacity and as executor of one Lalmoni Dasi deceased, and also against Preonath Sen in his individual capacity and as executor of that lady. It appears that the lady in question by her will, after giving certain pecuniary legacies, directed that a sum of Rs. 4,000 be raised from her estate for the worship of an idol, and she made Russick Lall Pal her residuary legatee. The executors having paid the pecuniary legacies referred to gave their assent to the legacy to Russick Lall Pal on condition of his paying them Rs. 4,000 for the purposes and upon the trusts created by the will. Subsequently a portion of the Rs. 4,000, *viz.*, Rs. 3,500, was advanced by Preonath Sen and Russick Lall Pal to the latter on a second mortgage of the estate with power to secure the sum for the idol by a mortgage.

"There is no question as to the mortgage ; it is admitted ; and the assignment to the plaintiff which took place on 29th July 1891 is also admitted ; and the only question which has been contested here is as to whether Russick Lall Pal, the mortgagor, is entitled to avail himself of the provisions of section 135 of the Transfer of Property Act, and further there are questions of costs.

"It is contended on the part of the plaintiff that the provisions of section 135 of the Transfer of Property Act are not applicable, at all events, in the case of a mortgage in the English form. It is further contended, assuming that the provisions of section 135 are applicable to a mortgage in the English form, that the Court ought not to give effect to the mortgagor's contentions in this case, because he has not exercised that amount of diligence in the ascertainment of his right which the law requires where a person seeks to avail himself of the section. As to the first question, namely, the applicability of section 135 to a mortgage

in the English form, I can see no distinction in principle between the case, in the first place, of a debtor who owes money on his own personal responsibility, and a debtor who owes money secured by mortgage. I can see no reason why, if, in the one case, the debtor may discharge himself by payment of the actual amount of consideration and incidental costs, he ought not to be able to do so in the other case. Nor in the second place can I see that there is any substantial or material distinction between the case of a mortgage in the English form and a mortgage in any other form provided for in the Transfer of Property Act. In each case the mortgage is but a security for the payment of a debt, and if the debt is discharged, the security goes with it.

"However it is perhaps unnecessary, in the view I have taken of this case, that I should go more minutely into the question, because I think Russick Lall Pal has not made out a case which brings him within the provisions of section 135. That the mortgagee is entitled, notwithstanding the assignment, to claim the full amount of the mortgage, has been established by cases in this Court; and, in order to avail himself of the provisions of section 135, the mortgagor, or other debtor, must bring himself within the principles laid down by this Court in the case of *Khoshdeb Biswas* v. *Satar Mondol* (1). In that case the learned Chief Justice and Mr. Justice Tottenham followed an earlier decision of this Court in *Grish Chandra* v. *Kashisauri Debi* (2), and laid down the principle by which cases of the kind are governed in the following words: "We think however that if the money paid by the plaintiff for the claim, with interest and expenses, were paid into Court immediately on the suit being brought, that would be a payment within the meaning of the section and would release the defendant from further liability." The rule thus laid down must no doubt be applied with a certain degree of elasticity, but the principle appears to be clear enough, that in order to avail himself of the provisions of section 135 the debtor must take his measures at the earliest opportunity.

"Now here what happened was this: The suit was insituted on the 2nd September 1891. Previously to that there was a letter of demand for the amount due on the mortgage and costs.

(1) I. L. R., 15 Calc., 436. (2) I. L. R., 13 Calc., 145.

1894

RUSSICK LALL PAL v. ROMANATH SEN.

On the 19th August 1891 the defendant's solicitor replied asking to be informed what the amount due on the assignment actually was, and on the 21st August 1891 the plaintiff's solicitors replied sending them a statement of account showing what was due for principal, interest and costs under the mortgage. It was contended by Mr. Sale for the mortgagor that the correspondence was conducted by the solicitors with advertence to section 135. What the mortgagor's solicitors wanted to ascertain was what was paid in respect of the assignment and what was due. The contention is that the letter of the 21st August 1891 was a misleading letter, because what the mortgagor's solicitors wanted to prove when he asked for a statement of the account was the actual state of things existing in respect of the assignment as distinguished from the mortgage. But it appears to me unlikely in a high degree that the parties at that stage had section 135 in their minds. What happened was a demand for payment of the amount due on the mortgage followed by an enquiry by the mortgagors as to what was the actual amount due. Whatever may have been the intention with which the mortgagor's solicitor wrote the letter of 19th August 1891, which expressed the readiness of the mortgagor to pay off whatever was due, no payment was made, and the suit was instituted on the 2nd September 1891.

"When the suit was brought, both parties were ignorant of their real position under the assignment. They had it not in their minds. The suit was brought under the impression that the assignee had the right to sue for the whole account due under the mortgage. I cannot ascribe to the mortgagee's solicitor any intention whatever to deceive. I think he was entitled to make the claim in the way he made it, and there is nothing whatever to lead me to suppose that the mortgagee's solicitors corresponded with the mortgagor's solicitors on the basis of a different state of things from that on which the latter corresponded with the former. What happens then is this: From the 2nd September 1891 to February 1892 nothing whatever was done by Russick Lall Pal for the purpose of asserting his right. In November 1891 a written statement was filed by the executors to the estate of Lalmoni Dasi, and it appears to me, having regard to the circumstances that this suit was based on the assignment, and that

the assignment was referred to in the plaint, and that the plaintiff craved leave to treat it as part of his plaint, that the defendants had ample notice of the character of the suit, and it was their clear duty to avail themselves of the defence now set up to enable the plaintiff, at all events, shortly after this suit was instituted, to make such enquiries as would enable him to see his true position. But Russick Lall Pal informs us in his evidence that he concerned himself in no way about the matter, and he was ignorant that he was entitled to discharge himself by payment of the sum due on the assignment. It seems to me it is incumbent on the person who seek to avail himself of section 135 to take the earliest opportunity of doing so; and applying this test I do not think that Russick Lall Pal has used that degree of diligence which the case demands.

"The consequence is that his defence under section 135 fails and the ordinary mortgage decree will be made. As to costs, as far as Russick Lall Pal is concerned, I see no ground for departing from the ordinary rule, but in the case of the executors I think the plaintiff ought to pay their costs. The scale of costs will be No. 2."

From this decision the defendant Romanath Sen appealed, mainly on the ground that he was under the circumstances entitled to the benefit of section 135 of the Transfer of Property Act.

Mr. *Woodroffe*, Sir *G. Evans*, and Mr. *P. O'Kinealy* for the appellant.

Mr. *L. P. Pugh*, and Mr. *Dunne*, for the respondent.

The following cases were cited in argument: *Rathnasami* v. *Subramanya* (1), *Jani Begam* v. *Jahangir Khan* (2), *Grish Chundra* v. *Kashisauri Debi* (3), *Subbammal* v. *Venkatarama* (4), *Khoshdeb Biswas* v. *Satar Mondol* (5), *Rajendra Narain Bagchi* v. *Watson & Co.* (6), *Hakimunnissa* v. *Deonarain* (7), *Nilakanta* v. *Krishnasami* (8) and *Ramachandra* v. *Venkatarama* (9).

(1) I. L. R., 11 Mad., 56.
(2) I. L. R., 9 All., 476.
(3) I. L. R., 13 Calc., 145.
(4) I. L. R., 10 Mad., 289.
(5) I. L. R., 15 Calc., 436.
(6) I. L. R., 18 Calc., 510.
(7) I. L. R., 13 All., 102.
(8) I. L. R., 13 Mad., 225.
(9) I. L. R., 13 Mad., 516.

1894

RUSSICK LALL PAL v. ROMANATH SEN.

The judgment of the Court (PETHERAM, C.J., and NORRIS and O'KINEALY, JJ.) was as follows :—

The only question which we think it is necessary to decide in this case is whether the assignee can recover the whole of the debt assigned to him, in an action brought by him against the debtor, or whether he is precluded by section 135 of the Transfer of Property Act from recovering in the action more than the amount which he paid for the debt, notwithstanding that, though the smaller sum is admitted to be due, it has not been paid and is not paid into Court in the action.

If the matter were new there is no doubt that it might be argued with much force that the words, "be against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale with interest, &c.," must mean that the debtor cannot be compelled to pay any larger sum, but it may equally be argued that as the section takes away a right it must be strictly read, and that it only gives the discharge upon actual payment. As appears in the judgment of the Court below it has been held by two Division Benches of the Court that nothing short of actual payment of the smaller sum, either in or before the action, will entitle the defendant to the benefit of the section, and these decisions are binding on us, unless we are prepared to say that we so entirely disagree with them as to render it necessary for us to refer the question to a Full Bench.

This we cannot say is the state of our minds, and though, as we have before said, we should, if the matter were new, feel that the argument in favour of the defendant's view had considerable force, we are not prepared to say that we do not agree with the conclusions at which two Benches of this Court have arrived. We think that the appeal should be dismissed with costs.

After the above portion of this judgment had been written the case of *Muchiram Barik* v. *Ishan Chandra Chuckerbutti* (1), and others in which precisely the same questions arose as those which arise in this case, was referred to a Full Bench: That Bench has now decided that a mortgage debt is an actionable claim within the meaning of section 135 of the Act, and agreeing

(1) I. L. R., 21 Calc., 568.

with the decisions of this Court that the defendant is not released by the section of any portion of his liability, unless he pays the amount which the assignee himself paid for the claim. The decision of course concludes this case, and in accordance with it this appeal will be dismissed with costs (1).

1894

RUSSICK LALL PAL v. ROMANATH SEN.

Appeal dismissed.

Attorney for the appellant: Baboo *Grish Chandra Sett.*

Attorneys for the respondent: Messrs. *Swinhoe & Chunder.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

GOPI KOERI AND ANOTHER (JUDGMENT-DEBTORS) *v.* GOPI LAL (DECREE-HOLDER) AND ANOTHER (AUCTION-PURCHASER.)*

1894 *April* 27 & *June* 5.

Second Appeal—Civil Procedure Code, 1882, sections 588, 622—Appeal from order—Order passed in Appeal reversing lower Court's order setting aside a sale in execution of Decree—Sale in execution of Decree—Setting aside sale—Material irregularity—Inadequacy of price—Revisional Power of High Court.

Under the provisions of section 588 of the Code of Civil Procedure no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity.

A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published, and that it referred to only 5 *bighas* instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment-debtor, having appealed to the High Court against the order of the District Judge and failed in such appeal by reason of no second appeal lying from such order,

*Appeal from Order No. 150 of 1893, and Civil Rule No. 806 of 1894, against the order of F. W. Badcock, Esq., District Judge of Bhagulpur, dated the 2nd of May 1893, reversing the order of Babu Bepin Behary Mukerjee, Munsif of Beguserai, dated the 20th of February 1893.

(1) An application for review of this decision was made on the 9th of July 1894, but was refused. Rep. note.

1894

GOPI KOERI v. GOPI LAL.

applied to the High Court under the provisions of section 622 of the Code to have the order set aside.

Held, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section.

THIS was an appeal from an order passed by the District Judge of Bhagulpur, reversing an order of the Munsif of Beguserai, setting aside a sale of certain immoveable property held in execution of a decree.

The application was made by the judgment-debtors, and the allegation was that there had been material irregularity in the conduct of the sale, and consequently the price fetched was far below the actual value of the property. The auction-purchaser resisted the application, but the decree-holder did not appear to oppose.

It appeared that the judgment-debtors had a 2-annas odd share in *taluk* Bullubhpur and Singpur, which contained 1,839 acres of land, but in the sale proclamation the area was put down as 5 *bighas* ; that the sale proclamation was not stuck up at the Collector's Office, nor was the proclamation at the spot properly proved ; that the price fetched was only Rs. 375, which was less than the revenue payable for the share, which was Rs. 385 odd.

The Munsif having found these facts proved held that the presumption was that the inadequate price fetched was due to the irregularities in the publication of the sale, and consequently ordered the sale to be set aside.

The auction-purchaser appealed to the District Judge, who reversed the Munsif's decision and dismissed the application. The following was the judgment :—

" The judgment-debtors applied to have a sale set aside. The Munsif set aside the sale and the auction-purchaser appeals. The Munsif has found that the judgment-debtors had a 2-annas odd share in *taluk* Bullubhpur and Singpur which contains 1,839 acres of land, but in the sale proclamation the area was put down as 5 *bighas* ; that the sale proclamation was not stuck up at the Collector's Office ; that the proclamation at the village was not properly proved, and that the price realized, Rs. 375, was inadequate.

"On the evidence I see no reason to differ from the Munsif's findings of fact; but the appellant's pleader argues that there is no proof that the inadequacy of price was due to the irregularities alleged. He quotes the cases of *Macnaghten* v. *Mahabir Pershad Singh* (1), *Tripura Sundari* v. *Durga Churn Pal* (2) and *Arunachellam* v. *Arunachellam* (3).

"The effect of these rulings is that there must be proof that the inadequate price was due to the irregularities. In the present case the real area was about 700 *bighas*, but in the sale proclamation the area is put at 5 *bighas*. This no doubt raises a strong presumption that the irregularities were the cause of the inadequate price; but apparently from the rulings above quoted this is not sufficient. The applicant called three witnesses who speak to the value of the property; but they do not appear to be men of means, nor do they say what amount they would have bid for the property if they had been aware of the sale. One of them, indeed, Chowdry Roghunath, says that the *maliks* would have bid more, but in this point the *maliks* were the best witnesses.

"No one has been called to say what he would have bid, nor is there any proof that there was a scarcity of bidders.

"On the ground that the applicant has failed to prove any connection between the irregularities and the inadequate price I think the decision of the Munsif must be set aside. The appeal is decreed with costs."

The judgment-debtors appealed to the High Court.

The *Advocate-General* (Sir *Charles Paul*) and Babu *Saligram Singh* for the appellants.

Mr. *J. T. Woodroffe*, Mr. *C. Gregory* and Babu *Kali Kishen Sen* for the respondent.

At the hearing of the appeal Mr. *Woodroffe* took the preliminary objection that, having regard to the provisions of section 588 of the Code of Civil Procedure, no second appeal lay from the Judge's order.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

(1) I. L. R., 9 Calc., 656. (2) I. L. R., 11 Calc., 74.
(3) I. L. R., 12 Mad., 19.

BENGAL SECRETARIAT LIBRARY

1894

GOPI KORRI v. GOPI LAL.

We think that the preliminary objection that has been raised by Mr. Woodroffe on behalf of the respondent ought to prevail, that objection being that no second appeal lies to this Court in this case, because the order of the Court of Appeal below is an order falling within section 588 of the Code of Civil Procedure.

This appeal will accordingly be dismissed with costs.

A rule was then applied for and issued on the application of the Advocate-General on behalf of the judgment-debtors calling on the auction-purchaser to show cause why the order of the District Judge confirming the sale should not be set aside, the application being made under section 622 of the Code of Civil Procedure.

That rule came on to be heard on the 5th June.

The *Advocate-General* (Sir *Charles Paul*) and Babu *Saligram Singh* in support of the rule.

Sir *Griffith Evans*, Mr. *T. A. Apcar*, Mr. *C. Gregory* and Babu *Kali Kishen Sen* for the auction-purchaser.

Sir *Griffith Evans*.—This Court has no power to interfere in this case with the decision of the District Judge under section 622. It can only act under that section in cases where the lower Court has exercised a jurisdiction not vested in it by law, failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdition illegally, or with material irregularity. Assuming in this case that the decision of the District Judge is erroneous, all that can be said is that he has come to a wrong decision in the case. He had perfect jurisdiction to decide the question before him, and it cannot be said that, even if he has come to an erroneous legal conclusion, he has exercised his jurisdiction illegally or with material irregularity.

The Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) have laid down that a Court having jurisdiction cannot, only on the ground that it has arrived at an erroneous conclusion, be said to have exercised its jurisdiction illegally, or with material irregularity; and the same principle is affirmed in *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (2).

The words "material irregularity" do not apply to an erroneous legal conclusion, but only to such matters as an irregularity

(1) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237.

(2) I. L. R., 16 Calc., 749; L. R., 16 I. A., 104.

in the procedure materially affecting the merits of the case—*Sew Bux Bogla* v. *Shib Chunder Sen* (1). In this Court it has been held [see *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (2)], that the erroneous application of the wrong statute to a case resulting in a decision that a suit will not lie, constitutes a material irregularity within the section. The provisions of the section are very fully discussed in a case before the Full Bench of the Madras High Court—*Manisha Eradi* v. *Siyali Koya* (3)—where it was held that a Court, by erroneously determining a preliminary question, cannot assume jurisdiction which it would not otherwise have, and that the section applied in such a case; but that in a case in which upon the facts found by the Subordinate Court, that Court has jurisdiction according to law, and there is no material irregularity in its procedure affecting the question of jurisdiction, the High Court cannot interfere under the section, though the decision of the lower Court on the merits or on any preliminary question is erroneous in law. See also *Bhashyam* v. *Jayaram* (4).

The Bombay Court has held that the decision of a question of *res judicata* though wrong did not warrant the interference of the High Court under section 622—*Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (5). In *Venkubai* v. *Lakshman Venkoba Khot* (6) Birdwood, J., discusses the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (7), and points out what he considers to amount to a material irregularity, but I submit his view is erroneous, and even that case does not cover this one.

In this case the most that can be said is that the lower Court has come to an erroneous conclusion on a question of law, even if it be assumed that the decision is erroneous, and as it had full jurisdiction to decide that question it follows, having regard to the decision in the Privy Council cases cited above, that this Court cannot interfere under section 622, and this rule should therefore be discharged.

The *Advocate-General* in support of the rule.—I shall contend (1st) that there was want of jurisdiction in the District Judge to

(1) I. L. R., 13 Calc., 225.
(2) I. L. R., 15 Calc., 47.
(3) I. L. R., 11 Mad., 220.
(4) I. L. R., 11 Mad., 303.
(5) I. L. R., 11 Bom., 488.
(6) I. L. R., 12 Bom., 617.
(7) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237.

1894

GOPI KOERI
v.
GOPI LAL.

confirm the sale; and (2nd) that if he had jurisdiction he acted illegally in the exercise of his jurisdiction.

As soon as the Judge found, as he practically did, that the sale proclamation had not been duly published, he was bound to refuse to confirm the sale. One cannot confirm that which does not exist. A Judge who records a judgment in ignorance, misconception or contravention of a plain rule of law well established acts "illegally." In this case the Judge, citing certain cases, considered that he could not give effect to a presumption naturally and reasonally arising in the case to the effect that the inadequacy of price was due to the irregularities alleged—amongst others to the mistake in the sale proclamation of 5 *bighas* instead of about 700 *bighas*—on the authority of those cases. He considered that according to those cases there must be specific oral evidence connecting the irregularities (the cause) with the inadequacy of price (the effect.)

I submit that the cases cited do not lay down the broad proposition indicated, and even if they do those decisions have been explained in a decision of a more recent date not cited by the District Judge, *viz*, *Gur Buksh Lall* v. *Jawahir Singh* (1), in which it was held that the relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. That case clearly applies to this, and I therefore submit that the District Judge acted illegally as above described.

In *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (2) it was held that a Judge who misconstrued a provision of an Act in such a way as to decline jurisdiction committed an error within the meaning of section 622, and the High Court (Petheram, C.J., and Ghose J.) set aside his judgment; and I contend that there is no real difference between misconstruction of a statutory law and a rule of law well established, and therefore I further submit that the present case is governed by the case last cited.

In *Lakshmana* v. *Najimudin* (3) the Madras High Court set aside an erroneous order of a Judge in a case under section 311 by virtue of the powers conferred by section 622.

(1) I. L. R., 20 Calc., 599. (2) I. L. R., 15 Calc., 47.
(3) I. L. R., 9. Mad., 145.

In *Dagdusa Tilakchand* v. *Bhukan Govind Shet* (1) the Bombay Court pointed out that in any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available.

The Privy Council cases cited on the subject of section 622 laid down that where there is no appeal, section 622 shall not be used in the same way as an appeal to set aside a decision erroneous in law. The decisions go no further, and do not apply to erroneous decisions within section 622 with which the High Court can interfere. The cases above cited—*Gur Buksh Lall* v. *Jawahir Singh* (2) and *Lakshmana* v. *Nojimudin* (3) clearly show when the High Court can interfere with erroneous decisions under section 622.

Finally, I submit that when the District Judge found that there was no actual sale he had no jurisdiction to confirm it. In confirming the sale he acted without jurisdiction. He also acted illegally, having jurisdiction, in deciding that cause and effect could not be presumed under the admitted circumstances such as existed here, namely, clear mistake of 5 *bighas* sold instead of about 700 *bighas* and the price being clearly grossly inadequate. Under these circumstances I submit that the judgment should be set aside.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

This was a rule calling upon the opposite side, the purchaser at an execution sale, to shew cause why the order of the District Judge of Bhagulpur confirming the sale should not be set aside.

The Judge has found, in concurrence with the Munsif, that the judgment-debtor had a 2-annas and odd *gundas* share in *taluk* Bullubhpur and Singpur, which contains an area of 1,839 acres of land, but that in the sale proclamation the area was put down as 5 *bighas* ; that the sale proclamation was not stuck up at the Collector's Office ; that the proclamation of sale at the village has not been properly proved, and that the price realized at the sale (Rs. 375) is inadequate. But he is of opinion that there is no direct proof

(3) I. L. R., 9 Bom., 82. (4) I. L. R., 20 Calc., 599.
(3) I. L. R., 9 Mad., 115.

1894

GOPI KOERI
v.
GOPI LAL.

(for that is how we understand his judgment) that the inadequacy of price was due to the irregularities ; and in this view he has held that the sale should be affirmed, relying, upon among others, the well-known case of *Macnaghten* v. *Mahabir Pershad Singh* (1).

The learned Advocate General in support of the rule has contended that the District Judge has fallen into a serious mistake in holding that there must be direct proof of the inadequacy of price being occasioned by the irregularities, and that, as held in the case of *Gur Buksh Lall* v. *Jawahir Singh* (2) the relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence, or may be inferred from circumstances. He has further contended that the Judge has not considered whether the sale was not altogether bad by reason of the sale notifications having not been published or proved to have been published.

If the case had come up before us in appeal we should have perhaps been prepared to say that the contention of the Advocate-General was correct.

But then the question is, whether it is competent to us to interfere with the order of the District Judge under section 622 of the Code of Civil Procedure.

What the Judge was called upon to determine on the appeal before him was, whether the sale was a good or bad sale. He has held the sale to be good. He had full jurisdiction to determine this question, one way or the other ; and we are unable to say that, in the decision he has arrived at, he has in any way acted without jurisdiction, or, in the exercise of his jurisdiction, he has acted illegally. All that can possibly be said is, that the Judge has committed errors in law, but we cannot say that in that respect he has acted illegally in the exercise of his jurisdiction.

Upon this ground we are unable to interfere with the order of the District Judge ; the result being that this rule will be discharged, but without costs.

Appeal dismissed and rule discharged.

H. T. H.

(1) I. L. R., 9 Calc., 656. (2) I. L. R., 20 Calc., 599.

Before Mr. Justice Ameer Ali and Mr. Justice Rampini.

RAJESHWAR PERSHAD SINGH (PLAINTIFF) *v.* BURTA KOER (DEFENDANT.)*

1894 *April* 13.

Bengal Tanancy Act (VIII of 1885), section 158—Application for enhancement of rent when no settlement proceedings are in operation.

The Court in dealing with an application under section 158 of the Bengal Tenancy Act cannot pass a decree for enhancement of the rent. Where therefore a landlord seeks to enhance the rent of his tenant when no settlement proceedings are going on he must institute a suit for the purpose, and cannot do so by means of an application under section 158.

THIS was an application by Rajeshwar Pershad Singh and others, proprietors of *mouza* Yakubpore, under section 158 of the Bengal Tenancy Act, for the determination of the incidents of the tenancy of one of his tenants, Burta Koer, in respect of lands held by her in that *mouza*.

The Subordinate Judge, after a commission had been issued to ascertain the situation, quantity and boundaries of the land held by Burta Koer, found that there was in her occupation under the applicants 12 *bighas* 16 *cottahs* 4¾ *dhurs* which was in excess of the quantity of land shown by the *jamabandi* by 1 *bigha* 6 *cottahs* 4¾ *dhurs*. As to the rent payable by her he observed:—

"The *jama* payable by Burta Koer for 11½ *bighas* of land was Rs. 14-4-9. Hence the rent payable by her for 12 *bighas* 16 *cottahs* 4¾ *dhurs* of land would be Rs. 15-14-9, and this I find to be the rent payable by Burta at the time of the application;" and a decree was made in accordance with that decision.

On appeal the Judge agreed with the lower Court as to the amount of land held by Burta Koer. He said "as to the rent payable for the holding the usual attempt was made to assess rent at rates corresponding to those paid for adjacent lands of similar quality. The Subordinate Judge, however, found the rent actually paid, and assessed rent on the excess lands at the existing rate. On this part of the case also I agree with his decision. The appeal will accordingly be dismissed with costs."

* Appeal from Appellate Decree No. 1303 of 1893, against the decree of J. Kelleher, Esq., District Judge of Sarun, dated 3rd of April 1893, affirming the decree of Babu Nilmoney Dass, Subordinate Judge of that district, dated the 11th of December 1891.

1894

RAJESHWAR PERSHAD SINGH v. BURTA KOER.

From this decision the landlord appealed mainly on the grounds that the Judge was wrong in holding that the rent payable at the time of the application meant the rent actually paid, and that he should have found what was the rent which the tenant was liable to pay at the time of the application, that is, he should have assessed rent at rates paid for adjacent lands of similar quality, or at any rate he should have assessed the rent of the excess lands at rates paid for similar lands in places adjacent.

Babu *Jadub Chandra Seal* for the appellant.

Babu *Saligram Singh* for the respondent.

The judgment of the Court (AMEER ALI and RAMPINI, JJ.) was as follows :—

This is a case under section 158 of the Bengal Tenancy Act. The plaintiffs are the landlords, and they apply for the determination of the incidents of the defendant's tenancy.

The only point raised before us in this appeal is that the lower Courts, in determining the rent payable by the defendant, have not fixed that rent in accordance with the rates paid for similar lands in the vicinity, but have calculated it at the rates hitherto paid by the defendant. In short, the objection is that the Courts below have not enhanced the defendant's rent. We, however, think the lower Courts are right. Section 158 (*d*) lays down that a Court dealing with an application under section 158 is to determine the rent payable by the tenant "at the time of the application." It, therefore, could not have been intended that in a case under this section the Court should pass a decree for enhancement which can ordinarily only take effect from the beginning of the agricultural year, next following, or from that of the year next but one following, the year in which the decree was passed.

It has been said that when no settlement proceedings are going on, an application under section 158 takes the place of an application under section 104 (2), in the course of which a Settlement Officer has power to enhance or reduce a tenant's rent. This is quite true, but when settlement proceedings are going on, the jurisdiction of the Civil Court is in abeyance (see section 111 *a*), so that no enhancement suit can then be instituted, and hence it is that the Settlement Officer is empowered to alter a tenant's rent. But an application under section 158 does not oust the jurisdiction

of the Civil Court in respect of the alteration of a tenant's rent. It, therefore, seems to us that if a landlord seeks to enhance his tenant's rent when no settlement proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of an application under section 158.

1894

RAJESHWAR PERSHAD SINGH v. BURTA KOER.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

PROSONNOMOYI DASSI *v.* SREENAUTH ROY AND OTHERS.
SREENAUTH ROY AND OTHERS *v.* MUDDOOSOODUN DUTT.*

1894 *May* 14.

Civil Procedure Code, section 295—Sale in execution of decree—Distribution of sale proceeds—Realization of proceeds of sale—Sale under agreement sanctioned by Court—Sale not of the right or interest of judgment-debtor in property.

P., the plaintiff in a suit No. 369 of 1886, obtained a decree for Rs. 2,14,728, in execution of which certain immoveable property was attached, including the premises 22 Strand Road, which was subject to certain trusts created by a deed, dated 2nd February 1858, executed by the father of the judgment-debtors, who with one *M.* were trustees of the deed. At the time of the attachment a suit No. 448 of 1883 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they were absolutely entitled to the premises 22 Strand Road and the other properties; in that suit on 26th March 1888 a decree was made declaring the valid trusts, and charging the premises 22 Strand Road, with the payment of certain specific sums. In 1891, the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22 Strand Road sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and to have the balance divided between the judgment-debtors; and by the decree in that suit, dated 2nd September 1892, the trustees of the deed were authorised to sell the premises 22 Strand Road, and were directed out of the proceeds of sale to set aside Rs. 45,000 to provide for the trusts, next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority the trustees on 25th February 1893 entered into an agreement with one *J. L.* for sale to him of the premises 22 Strand Road for Rs. 1,43,000. On 8th August 1893 a notice was issued at the instance of *P.* calling on the judgment-debtors to

* Application in Original Civil Suits Nos. 369 of 1886 and 441 of 1891.

1894

PROSONNO-MOYI DASSI v. SREENAUTH ROY.

show cause why the premises 22 Strand Road, should not be sold in execution under her attachment. On 29th August 1893 the trustees of the deed of 2nd February 1858 gave notice to *P.* of an application to be made in the suits Nos. 369 of 1856 and 441 of 1891 for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees with *J. L.* be carried out; that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of *P.*; that the balance be paid to the credit of suit No. 369, "as subject to the said attachment," and that the premises 22 Strand Road be thereupon released from attachment. These applications were heard together, and on the 14th September 1893 a consent order was made, by which it was ordered that the trustees be at liberty to carry out the agreement for sale with *J. L.*; that the sale proceeds be paid to *W.*, a member of the firm of the attorneys for *P.*, who out of such proceeds was to pay Rs. 45,000 to the trustees, and make other payments directed by the order, and pay the balance into Court to the credit of suits Nos. 369 of 1886 and 441 of 1891, "the said *P.* retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase-money was paid to *W.*, who after making the payments directed paid the balance into Court. Whilst in the hands of *W.* the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments: *Held*, on an application by *P.* to have the money paid out to her in part satisfaction of her decree, that it could not be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of section 295 of the Code of Civil Procedure. The sale of the property under the order of 14th September 1893 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them.

To constitute a "realization" within the meaning of section 295 there must be either a realization by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to *B* in respect of her lien, the amount of such excess might perhaps have been treated as a "realization in execution" within the meaning of section 295, but the balance in *W's* hands was less than the amount due to *P*, and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate.

Purshotam Dass v. *Mahanant Surajbharthi* (1), and *Sewbux Bogla* v. *Shib Chunder Sen* (2) referred to and approved.

(1) I. L. R., 6 Bom., 588. (2) I. L. R., 13 Calc., 225.

This was an application in which the facts were as follows :—

That by a decree in suit No. 369 of 1886, dated 6th December 1886, the defendants in that suit were ordered to pay the plaintiff the sum of Rs. 2,14,728-1, with interest and taxed costs of suit; that in February 1887 in execution of that decree certain immoveable property belonging to the judgment-debtors was attached, including the premises No. 22 Strand Road; that at the time of the attachment a suit No. 448 of 1883 was pending in the High Court for the construction of a deed of trust, dated 2nd February 1858, executed by the father of the judgment-debtors for ascertainment of the rights of the parties thereunder, and for a declaration that subject to any valid charges the judgment-debtors were absolutely entitled to the properties comprised in the deed, which included the attached properties; that by the final decree made in suit No. 448 of 1883 on 26th March 1888 the trusts of the deed of 2nd February 1858 were declared, and the premises 22 Strand Road were charged with the sums payable in respect of the trusts of the deed; that subsequently suit No. 441 of 1891 was instituted to have it declared that it was unnecessary to retain the premises 22 Strand Road for the purposes of the trusts, and that those premises might be declared to be discharged from the operation of the trusts, and might be sold, and out of the sale proceeds, after certain specified claims had been paid, a sum might be retained for the purposes of the said trusts, and the balance be divided equally between the judgment-debtors; that on 2nd September 1892 a final decree was made in that suit (441 of 1891) whereby the premises 22 Strand Road were ordered to be sold, and after retaining Rs. 45,000 for the purposes of the trusts and the costs of suit, the balance was directed to be applied to the purposes in the plaint mentioned; that on 8th August 1893 the plaintiff in suit 369 applied for an order for sale of the premises 22 Strand Road, and a notice was issued to the judgment-debtors to show cause why they should not be sold; that on 29th August 1893 a notice was served on the plaintiff in suit No. 369 at the instance of the judgment-debtors, (who, together with one Muddooscodun Dutt were the trustees of the deed of trust of 2nd February 1858), of an application for an order that the attachment on the premises 22 Strand

1894

PROSONNO-MOYI DASSI v. SREENAUTH ROY.

Road, in execution of the decree in suit No. 369, should be removed, and that the plaintiff in that suit should pay the costs of the application, or in the alternative for an order that an agreement for sale for Rs. 1,43,000 of the said premises 22 Strand Road, which had been made between the trustees of the deed of 2nd February 1858 of the one part and Joygobind Law of the other part, dated 25th February 1893, should be carried out, and the proceeds of sale be applied in the first place towards making certain payments specified in the application (including the payment of a sum of Rs. 45,000 to the trustees of the trust deed for the purpose of carrying out the trusts, and a sum due to Messrs. Watkins & Co. for costs, for which they claimed a lien on the title deeds of the premises 22 Strand Road), and that the balance should be paid into Court to the credit of suit No. 369 as subject to the attachment in that suit, and that the said premises should be released from the attachment; and that the plaintiff in suit No. 369 should pay the costs of and incidental to the application; that the application by the plaintiff in suit No. 369 and that of the judgment-debtors came on for hearing on 14th September, when by consent of all the parties an order was made in suit No. 369, whereby it was ordered that the trustees of the deed of trust of 2nd February 1858 should be at liberty to carry out the contract for sale of the premises 22 Strand Road, to Joygobind Law, the plaintiff releasing her claim to those premises under the attachment for the purpose only of permitting the sale, the sale proceeds to be paid in the first instance to Mr. Watkins who should thereout pay all the costs of and incidental to the sale, the sum of Rs. 45,000 to the trustees of the deed of 2nd February 1858 to be held by them for the purposes of the trusts as declared by the order of 2nd September 1892, and certain other payments, and pay the balance of the sale proceeds into Court to the credit of the suits Nos. 369 of 1886 and 441 of 1891, "the plaintiff Prosonnomoyi Dassi retaining her lien under her attachment upon the said balance in the same way as it then subsisted on the attached property"; the lien if any of Messrs. Watkins & Co. on the title deeds of the property to attach to the balance to be paid into Court, costs to be reserved until further order of Court, and the order to be without pre-

judice to the right of the parties ; that the sale of the premises 22 Strand Road was carried out under the above order, and from an account furnished by Mr. Watkins to the plaintiff in suit No. 369 it appeared that after paying the sums as directed by the said order, and retaining a sum of Rs. 2,000 on account of Messrs. Watkins & Co.'s costs subject to settlement, the balance was paid into Court, and there was in Court the sum of Rs. 75,405-14-8 to the credit of the two suits ; and that after the realization of the proceeds of sale by Mr. Watkins, on the 23rd November 1893, attachments were issued in two other suits brought by one Behary Lall and one Balmokund Singonya, respectively, against the judgment-debtors, *viz.*, suits Nos. 51 and 52 of 1893 against the proceeds of sale in the hands of Mr. Watkins, and the money was paid into Court with notice of these attachments.

The application was that the said sum of Rs. 75,405-14-8, and any balance that might remain in the hands of Mr. Watkins after adjustment of his costs, might be paid to the plaintiff in suit No. 369 of 1886 in part satisfaction of her decree in that suit ; or if the Court should be of opinion that the plaintiff was not alone entitled to the said money, then for an order for rateable distribution under section 295 of the Code of Civil Procedure to those entitled to share in it.

Mr. *Dunne* (with him Mr. *Bonnerjee*) for the applicant (the plaintiff in suit No. 369 of 1886.)

Mr. *Phillips* for the judgment-debtors and for Mr. N. S. Watkins.

Sir *Griffith Evans* for the trustees.

Mr. *Allen* for the attaching creditors in suits Nos. 51 and 52 of 1893.

Mr. *Henderson* and Mr. *O'Kinealy* for other attaching creditors.

The following cases were cited in support of the application : *Vishvanath Maheshvar* v. *Virchand Panachand* (1), *Purshotam Dass* v. *Mahanant Surajbharthi* (2), *Sewbux Bogla* v. *Shib Chunder Sen* (3), *Soobul Chunder Law* v. *Russick Lal Mitter* (4), and *Hafez Mahomed Ali Khan* v. *Damodar Pramanick* (5).

(1) I. L. R., 6 Bom., 16.
(2) I. L. R., 6 Bom., 588.
(3) I. L. R., 13 Calc., 225.
(4) I. L. R., 15 Calc., 202.
(5) I. L. R., 18 Calc., 242.

1894

PROSONNOMOYI DASSI v. SREENAUTH ROY.

SALE, J.—This is an application as to the disposition of a fund representing the balance of the sale-proceeds of the premises No. 22 Strand Road, which was paid into Court to the credit of the two abovementioned suits under an order, dated the 14th September 1893. The circumstances under which this fund was paid into Court are as follows :—

The plaintiff Prosonnomoyi obtained a decree in the first suit, dated 6th December 1886, for the sum of Rs. 2,14,728 with interest and costs against Sreenauth Roy, Sumbhoonauth Roy and Gopinauth Roy.

In February 1887 the plaintiff, in execution of the decree, attached various properties, including the premises No. 22 Strand Road, which were subject to certain trusts created by an Indenture, dated 2nd February 1858, executed by the father of the judgment-debtors. At that time a suit No. 448 of 1883 was pending, wherein the judgment-debtors as plaintiffs sought for a declaration of what were the valid trusts under the Indenture of Trust, and that, subject to such trusts, the plaintiffs were absolutely entitled to the premises No. 22 Strand Road, and the other properties. On the 26th March 1888 a decree was made in that suit declaring what were the valid trusts, and charging the premises No. 22 Strand Road with the payment of certain specific sums.

In 1891, the second of the abovementioned suits was instituted by the judgment-debtors, the object of which was to have the premises No. 22 Strand Road sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and then to have the balance divided equally amongst the judgment-debtors.

By the order of the 2nd September 1892 made in that suit the trustees of the Indenture of Settlement were authorized to sell the premises No. 22 Strand Road, and were directed out of the proceeds to set apart Rs. 45,000 to provide for the trusts; next to pay the costs therein directed, and then to apply the balance "for the purposes in the plaint mentioned." In pursuance of this authority the trustees, being the judgment-debtors and one Muddoosoodun Dutt, on the 25th February 1893, entered into an agreement with one Joygobind Law for sale to him of the premises No. 22 Strand Road for the sum of Rs. 1,43,000.

On the 8th of August 1893 a notice was issued at the instance of the plaintiff Prosonnomoyi Dassi calling upon the judgment-debtors to show cause why the premises 22 Strand Road should not be sold in execution of her attachment. On the 29th of August 1893 the trustees gave notice to the plaintiff Prosonnomoyi Dassi of an application to be made in both the abovementioned suits for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees be carried out, and that the sale proceeds be applied for the purposes in the notice specified, as having priority over the claim of the judgment-creditor Prosonnomoyi Dassi, that the balance be paid to the credit of the first mentioned suit, as subject to the said attachment, and that the property be thereupon released from attachment. Both applications were heard together, and on the 14th September 1893 an order was made with the consent of all the parties, whereby it was, amongst other things, ordered that the trustees be at liberty to carry out the agreement for sale with Joygobind Law, the plaintiff agreeing to release her claim to the property for the purposes of the sale only; that the sale proceeds be paid to Mr. N. S. Watkins; that he do thereout pay the sum of Rs. 45,000 to the trustees and make the other payments directed by the order and then pay into Court the balance to the credit of both the abovementioned suits, "the said Prosonnomoyi Dassi retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." There was also a direction that the lien, if any, of Messrs. Watkins & Co. on the title deeds of the premises should attach to the balance. By this order the attachment was removed, but in place thereof a lien was created in favour of the judgment-creditor which was to attach to the balance of the proceeds of sale. The property was sold by the trustees free from the attachment, and the purchase-money was paid to Mr. Watkins, who made certain payments as directed by the order, and after retaining a sum for costs in respect of which his firm claimed a lien on the title deeds, paid the balance into Court. Messrs. Watkins & Co. now claim a further sum in satisfaction of their lien, and there is also a claim by the trustees in respect of certain of the payments directed by the order, which, it is alleged, have not yet been satisfied.

1894

PROSONNO-MOYI DASSI v. SREENAUTH ROY.

It appears that the balance, while in the hands of Mr. Watkins, was attached by two other judgment-creditors, being the plaintiffs in the suits No. 52 of 1893 and No. 51 of 1893 who had obtained decrees against the defendants Sreenauth Roy, Shumbhoonauth Roy, and Gopinauth Roy, and that it was paid into Court to the credit of both the abovementioned suits with notice of these attachments.

The plaintiff Prosonnomoyi Dassi now asks to have the balance (after satisfaction of the claims of the trustees and of Messrs. Watkins & Co.) paid out to her in priority to the attaching creditors, who, on the other hand, claim to share rateably in the fund under the provisions of section 295 of the Code.

At the hearing of the application a third judgment-creditor appeared and claimed to share in the distribution of the fund.

The main question is whether under the circumstances this fund can be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of section 295. Can it be said, in the first place, that the sale of the property under the order of the 14th September was a sale in execution?

If the property had been sold under the proviso to section 295, it would have been, doubtless, a sale in execution, but at the same time a sale from the benefit of which the attaching creditors would have been excluded. For the proviso after fixing the order of payment of the prior charges restricts the distribution of the balance to the "holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering the sale for execution of such decrees and have not obtained satisfaction thereof."

The facts show that the sale of this property did not take place under the proviso, and that it was a sale, not in execution of any decree or order, but in pursuance of a private agreement entered into by the trustees with the purchaser under a liberty reserved to them by the Court. The sale no doubt was further sanctioned by the Court as part of the arrangement embodied in the consent order of the 14th September, under which Prosonnomoyi agreed to remove her attachment, and thus allow the sale to be carried out, on the condition that instead of the attachment she should have a

lien on the purchase-money. But in no sense can it be suggested that the sale was in *execution* of this order.

The case of *Purshotam Das* v. *Mahanunt Surajbharti* (1) decides that section 295 must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." Here the sale did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them. It was a sale by the trustees of property which was vested in them as trustees. Moreover, reading the case just cited with the case of *Sewbux Bogla* v. *Shib Chunder Sen* (2), the rule appears to be that to constitute a realization within the meaning of section 295, it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code. It cannot, I think, be said that the money paid to Mr. Watkins under the order of the 14th September 1893 was *realized* in any of the methods provided by the Code for realizing property in execution of a decree.

When the fund was attached it was held by Mr. Watkins subject to a prior lien created by an order of Court in favour of the plaintiff Prosonnomoyi, which lien was binding on the judgment-debtors and those claiming under them. When paid into Court this fund was still subject to that lien. If the money paid into Court had exceeded the amount due to the plaintiff in respect of which the lien was created in her favour, the amount of such excess having been paid into Court with notice of the attachment might perhaps have been treated as a realization in execution within the meaning of section 295. For the excess in that case would have been money belonging to the judgment-debtors attached while in the hands of a third party and subsequently paid into Court under an order of the Court. Payment into Court under such circumstances forms a well recognized method of realization in execution under the Code. But the balance in Mr. Watkins' hands was very far below the amount due to the plaintiff Prosonnomoyi Dassi and was entirely absorbed by the lien in her favour. There was therefore no surplus upon which the attachments could operate.

(1) I. L. R., 6 Bom., 588. (2) I. L. R., 13 Calc., 225.

1894

PROSONNOMOYI DASSI v. SREENATH ROY.

In my opinion this is not a case of distribution of assets under section 295. The rights of the judgment-creditors claiming to share in this fund must therefore be postponed to the rights of the plaintiff Prosonnomoyi Dassi under the lien declared in her favour by the order of the 14th September 1893.

There being no contest as between the plaintiff Prosonnomoyi Dassi and the trustees and Messrs. Watkins & Co. there must be an order for payment of the balance to her after satisfaction of the claims of the trustees and of Messrs. Watkins & Co. The costs of the parties sharing in the fund may be added to their claims.

Attorney for the plaintiff Prosonnomoyi Dassi: Mr. *Rutter.*

Attorneys for the trustees and the judgment-debtors: Messrs. *Watkins & Co.*

Attorneys for the attaching creditors in suits 51 and 52 of 1893: Messrs. *Sanderson & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894 *May* 21.

AJUDHIA PERSHAD (JUDGMENT-DEBTOR) *v.* BALDEO SINGH (DECREE-HOLDER.) *

Civil Procedure Code, 1882, section 235—Order absolute for sale, Application for—Execution of decree—Verification of application—Limitation—Transfer of Property Act (IV of 1882), section 89.

An application for an order absolute for sale of mortgaged property under the provisions of section 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree and need not therefore be in the form prescribed by section 235 of the Code of Civil Procedure.

A decree was passed in a mortgage suit on the 13th July 1887 by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295—1304 (1888—1897) in the month of Falgoon (February) each year, and that on default of three successive instalments the whole amount was to become at once due and payable. The mortgagor having defaulted in payment of the instalments due in the years 1297, 1298, and 1299 (1880, 1891, 1892) the mortgagee on the 18th February 1893 presented an application to the Court under section 89 of the Transfer

* Appeal from Order No. 152 of 1893, against the order of Babu Madhab Chander Chatterjee, Subordinate Judge of Bhagalpur, dated the 10th of May 1893.

of Property Act for an order absolute for sale. That application was not verified by the mortgagee, and the mortgagor objected that, not being so verified as required by section 235 of the Code, it could not be granted. On the 9th May 1893 the mortgagee applied for and obtained leave to verify the application which he did on that day. It was urged on behalf of the mortgagor that the application must be treated as made on the 9th May, and therefore not within three years of the date on which the 1297 instalment became due (7th March 1890), and that it was therefore barred by limitation.

Held, that the application did not require to be in the form provided by section 235, and consequently the non-verification did not affect it, and that it was not barred by limitation.

THE facts of this case were as follows :—

The respondent Baldeo Singh, on the 13th July 1887, obtained a decree against several defendants in a suit instituted by him against them on a mortgage. There were three sets of defendants the judgment-debtors in this proceeding, Ajudhia Pershad being one out of the second set. The decree was made by consent being the result of a compromise under which it was agreed that the decree should be for Rs. 12,000 without interest and costs, and that each set of defendants should be liable for a third of that amount, and that their respective shares in the mortgaged property should remain charged till the decree was satisfied. It was provided in the decree that the amount due should be paid in ten annual instalments during the years 1295 to 1304 (1888—1897) in the month of Falgoon (February) in each year, and that on default being made in the payment of three successive instalments the whole amount outstanding was to become due and payable to the plaintiff, and be realized by the sale of the respective shares of the defendants in the mortgaged property.

On the 18th February 1893 the plaintiff Baldeo Singh applied to the Subordinate Judge for an order absolute for the sale of the mortgaged property against all the defendants, alleging that the three instalments for the years 1297, 1298, and 1299 (1890, 1891, 1892) due under the decree had not been paid.

Ajudhia Pershad alone opposed the application and filed several petitions of objections against the order being made. Amongst other grounds he urged that the decree being separate against each set of defendants one application against them all jointly would not lie; that the application for sale not being verified by

1894

AJUDHIA PERSHAD v. BALDEO SINGH.

the decree-holder no order could be passed ; and that there had been default in the payment of the first three instalments, *viz.*, those for the years 1295 to 1297 (1888 to 1890), and that consequently the application was barred by limitation.

In answer to the second objection the plaintiff decree-holder on the 6th May 1893 filed a petition asking to be allowed to verify his petition. The matter appeared to have come on for hearing on the 9th May, and on that date the Subordinate Judge allowed the petition to be verified, which was immediately done. The objection having been heard judgment was reserved till the following day. On the 10th May the judgment-debtor Ajudhia Pershad filed a further petition of objection, contending that the application must be treated as made on the 9th May, the date of its being verified, and that it was therefore barred by limitation, being made more than three years after the accrual of the right on the 1st Cheyt 1297 (8th March 1890).

The Subordinate Judge delivered judgment on the 10th of May, and disposed of the three objections above referred to in the following manner :—

"The first point was not pressed during the hearing of the application, but as the objection was taken in the written objections filed, I think it proper to notice it here. This is not an application for execution. Consequently under the provisions of section 647, the provisions of section 34 of the Code of Civil procedure are applicable to this case. This being virtually an objection on the ground of misjoinder of parties, it ought to have been taken at the earliest opportunity before the first hearing of the case, for which the 20th March was fixed. The judgment-debtor appeared on that day, but did not object to the petition on that ground ; he only asked for time. The Court allowed him seven days' time, but even then he did not take this objection. I think, therefore. that such an objection cannot be entertained now. But supposing it can be raised now, still it does not seem to me that the objection is valid. The decree is based on the same compromise ; the mortgaged property is the same, although each has a separate share. This being merely an application for an order absolute for sale, the irregularity, if any, cannot be fatal.

"The second objection is reasonable. Such application must be verified, but the applicant neglected to verify it. He has however applied for permission to verify when that defect was pointed out at the hearing by the pleader for the judgment-debtor. The latter contends that such an amendment cannot be allowed at this stage, because under the ruling in *Oudh Behari Lal* v. *Nageshar Lal* (1) this application must be deemed as an application for

(1) I. L. R., 13 All., 278.

execution, and it has been held in *Asgar Ali* v. *Troilokya Nath Ghose* (1) that no such amendment can be allowed when the petition has been registered. But there is nothing in the first ruling to show that this petition can be regarded as a petition for execution of a decree; consequently section 245 of the Code of Civil Procedure, on which the second decree is based, does not govern this case. It is not an application for execution of a decree, and, what is more, it has not been entered in any register, as none has been prescribed for it. Under section 647 of the Code of Civil Procedure, section 53 is applicable with respect to this petition, and as such it can be amended now. I have therefore allowed it to be verified now. The objection therefore is no longer tenable.

"Third: It was also contended that there was default in the first three instalments; consequently petitioner's cause of action for such an application accrued when default was made with respect to the instalment of 1297. Limitation began to run from that time. This may be true, but calculated from that time this petition was presented within three years. Therefore plaintiff's right to execute the decree was not barred on the 20th February, when this petition was filed. If it be held that limitation began to run from the date of the *kist* of 1297, that is Falgoon 1297, and no steps in aid of execution be existing to save the case from limitation, then possibly it may be so barred, although I am not at all sure of it. But that circumstance cannot be taken into consideration now. Here all I have to see is, when this application was filed had the decree-holder any subsisting right to realize the decretal amount, or was it barred by limitation. I have shown it was not so barred. This objection therefore also falls to the ground.

"In the view I take of the case it is unnecessary to enquire whether there was default only in 1297, 1298 and 1299.

"Just before delivery of judgment, the judgment-debtor has filed a fourth petition of objection. Objection by such instalments is extremely irregular, and is inconvenient to all concerned. It is now urged that as the petition for the order absolute for sale was verified only yesterday, it should be considered that the petition in question was filed yesterday, and the plaintiff's right to realize the debt is consequently barred by limitation; but the date of a petition or plaint is not the date when it is amended but when it is presented. This objection is not therefore more reasonable than the others.

"It is ordered therefore that the objections be disallowed and the order for sale be made absolute."

The judgment-debtor Ajudhia Pershad appealed to the High Court.

Dr. *Trailakya Nath Mitter* and Babu *Makhan Lal* for the appellant.

Babu *Saligram Singh* and Babu *Raghunandun Pershad* for the respondent.

(1) I. L. R., 17 Calc., 631.

1894

AJUDHIA PERSHAD v. BALDEO SINGH.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

The parties to this proceeding stand to each other in the relation of mortgagor and mortgagee. The mortgagors are three in number ; they had borrowed from the mortgagee a considerable sum of money ; and a suit was brought upon the mortgage, and, in the course of the suit, a compromise was entered into between the parties. Under this compromise, each of the mortgagors agreed to pay to the mortgagee the sum of Rs. 4,000 by certain instalments ; and it was provided that as security for the sum payable by each mortgagor, a third share of the properties already mortgaged should continue to be in mortgage, and that in the event of any of the mortgagors committing default in three consecutive instalments, the mortgagee should be entitled to realise the money payable by such mortgagor by sale of his share of the properties mortgaged. A decree was accordingly made in those terms. Subsequently the mortgagee, by reason of the default committed by the mortgagors in paying the instalments on account of the years 1297, 1298 and 1299, applied for the sale of the mortgaged properties. It appears that at the time when this application was presented, it bore no verification by the mortgagee, but subsequently, upon an order made by the Court, the defect, if there was any, was rectified.

The mortgagors raised several objections to the application of the mortgagee being granted. They contended that this being an application for execution of the decree, it could not be proceeded with, inasmuch as it did not contain, at the time of presentation, the verification of the mortgagee, that being one of the requirements of section 235 of the Code of Civil Procedure ; that the application was barred by limitation ; and that because subsequent to the default complained of by the mortgagee, *i.e.*, as regards the instalments for 1297, 1298 and 1299 he received from them (the mortgagors) the instalment for the year 1296, he thereby waived the default on account of those years.

As regards this last objection, it is sufficient to say that the amount received by the mortgagee after this default was not in respect of any one of the three years with which we are now concerned. What was received by the mortgagee was the amount payable on account of a year antecedent to the three years in respect

of which default has now occurred, and for which, in accordance with the express stipulations contained in the decree, the mortgagee is entitled to apply for realization of the amount due to him by sale of the mortgaged properties.

The question of limitation raised by the mortgagors is intimately connected with the objection that the application presented on behalf of the mortgagee, having not being duly verified at the time it was presented, it could not be regarded as an application for execution within the meaning of the Code of Civil Procedure. The learned vakil in support of his argument relied upon a case in the Allahabad High Court, *Oudh Behari Lal* v. *Nageshar Lal* (1), where it seems to have been held that an application for an order absolute for sale under section 89 of the Transfer of Property Act is a proceeding in execution and subject to the rules of procedure governing such matters. Now, on referring to the Transfer of Property Act itself, it will be found that when a mortgagee applies either for foreclosure of a mortgage, or for sale of the mortgaged premises, the Court makes a preliminary decree—a decree *nisi* so to say—ordering that the mortgagors should be at liberty to pay to the mortgagee the amount of money due to him within a certain time fixed, and that in the event of the mortgagor not satisfying the claim of the mortgagee within the time limited, the property should be foreclosed, or, in the case of an application for sale of the mortgaged premises, the mortgaged property or a sufficient part thereof should be sold.

Then we find in section 89 of the Act that, in the event of the mortgagor not paying to the mortgagee the amount of money mentioned in the preliminary decree, and upon an application being made by the mortgagee, an order absolute for sale should be made. Therefore when, after a preliminary decree made by the Court, the mortgagee makes an application for an order absolute (or for a decree absolute, for that would perhaps be a more appropriate expression), the application is not an application for execution of the decree, because, until the decree absolute is made under section 89, there is in fact no decree capable of execution. A question somewhat akin to that which we have to determine

(1) I. L. R., 13 All., 278.

1894

AJUDHIA PERSHAD v. BALDEO SINGH.

was considered by this Court in *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1). The question that was raised in that case was whether, until the order absolute is made under section 87 of the Transfer of Property Act, the mortgagor could not redeem the mortgage; and with reference to this question the learned Judges expressed themselves as follows: "Apart however from the English cases, it is quite clear that the Legislature in enacting section 87 intended to give *some* effect to it, but if the respondent's contention were right, this section would be of no effect, and section 86 *plus* non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act provides that if the payment be not made within the time fixed in the decree 'the plaintiff may apply to the Court for an order that the defendant, and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property.' That means without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order shows that without that order the right to redeem would not be taken away. Section 87 goes on to says: 'And the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff.' If the property be not redeemed the Court would have to pass an order absolute. It seems quite clear to us that the fact of the Legislature having made this provision requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property."

We may say we entirely concur in the view thus expressed. It seems to us that the application that was presented by the mortgagee for sale of the mortgaged property, being an application within the meaning of section 89 of the Transfer of Property Act, it could be given effect to, even if it was not in compliance with the terms of section 235 of the Code of Civil Procedure.

We have already said that the question of limitation that was raised in the Court below by the appellant depended upon the validity of the objection that the application of the mortgagee should have been verified. If this objection could not be sustained,

(1) I. L. R., 16 Calc., 246.

it was admitted by the learned vakil for the appellant that the plea of limitation also could not succeed.

1894

AJUDHIA PERSHAD v. BALDEO SINGH.

On these grounds we are of opinion that this appeal should fail, and we accordingly dismiss it with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

ROGHU SINGH (AUCTION-PURCHASER) *v.* MISRI SINGH (APPLICANT) AND ANOTHER (JUDGMENT-DEBTOR) AND ANOTHER (DECREE-HOLDER.)*

1894 *May* 18.

Appeal—Bengal Tenancy Act (VIII of 1885), section 173—Order setting aside sale in execution of decree for rent.

No appeal lies from an order setting aside a sale under section 173 of the Bengal Tenancy Act.

THIS was an application under section 173, sub-section 3 of the Bengal Tenancy Act, to set aside an execution sale on the ground that the purchase had been made by the judgment-debtor in the name of Roghu Singh. The applicant Misri Singh claimed to be a co-sharer with the judgment-debtor Khiali Singh, though he was not sued for the rent in execution of the decree, for arrears of which the sale took place.

The Munsif, after holding that the application was not barred by limitation, found on the merits that Khiali, the judgment-debtor, had himself purchased the property in order to deprive Misri Singh, the applicant (who was found to be a relative of the debtor), of it. The Munsif, therefore, ordered that the sale be set aside.

The auction-purchaser Roghu Singh appealed to the Judge, who held that no appeal lay from the order, and this is the only question material to this report. As to this the Judge said :—

"In this case I am asked to hear an appeal from an order of the Court below setting aside a sale under section 173 of the Bengal Tenancy Act. It is admitted on both sides that such an order is not appealable under section 588 of the Civil Procedure Code ; but it is contended for the appellants that not being provided for in section 588 it must be taken to be a 'decree.' I cannot agree to this proposition. The word 'decree' and the word 'order' are both defined in the Civil Procedure Code ; and if all orders which are not included in section 588 are decrees, then there is no occasion for any definition and no occasion for section 588 being enacted at all. Section 588 says that

* Appeal from Order No. 216 of 1893 against the order of R. Holmwood, Esq., Officiating District Judge of Bhagulpur, dated 2nd of June 1893, affirming the order of Babu Soshi Bhusan Chowdhri, Munsif of Monghyr, dated 14th of April 1893.

1894

ROGHU SINGH v. MISRI SINGH.

the orders mentioned therein are the only orders appealable under the Code. There must therefore be other orders contemplated by the definition. An order setting aside a sale cannot in my opinion be a decree, as it is not a formal expression of an adjudication upon any right claimed or defence set up: it is an order in a proceeding incidental and subsidiary to a decree. It certainly does not make the receiver of the relief a decree-holder as defined in the Code. When the definition of a decree says that an order specified in section 588 is not within the definition, it must be held that the same class of orders under other Acts are not decrees, and therefore not appealable unless expressly made so by law, for section 588 itself excludes such orders from the ordinary appellate jurisdiction in decrees, and makes them miscellaneous matters. The setting aside of a sale is not contemplated in section 244 of the Civil Procedure Code, so that I must hold that I have no jurisdiction to entertain this appeal. There is no ruling on the subject so far as the Court and the pleaders engaged have been able to discover, and it is with a view to getting the question authoritatively decided that the appellant has preferred to take my order on appeal rather than to withdraw the appeal and petition the High Court against the Munsif's decision."

The appeal was, therefore, dismissed with costs; and Roghu Singh appealed to the High Court on the ground that the Judge was in error in holding that the order under section 173 of the Bengal Tenancy Act was not appealable.

Dr. *Trailakya Nath Mitter* and Babu *Degumber Chatterjee* for the appellant.

Babu *Rajendro Nath Bose*, and Babu *Amarendro Nath Chatterjee* for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

We think that the learned District Judge was right in holding that no appeal lay against an order setting aside a sale under section 173 of the Bengal Tenancy Act. The order in question could not be regarded as a "decree" as defined by the Code of Civil Procedure, nor could it fall within section 244 of that Code, because the appellant was an outsider, and not a party to the suit in which the decree was made. The Bengal Tenancy Act itself does not provide for an appeal against an order like this, and we are not aware of any provision in the Civil Procedure Code allowing an appeal against such an order.

That being so, this appeal will be dismissed with costs.

Appeal dismissed.

J. V. W.

CRIMINAL REVISION.

Before Sir William Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BASIRADDI AND OTHERS (PETITIONERS) *v.* QUEEN-EMPRESS (OPPOSITE PARTY.)*

1894 *June* 1.

Criminal Procedure Code (Act X of 1882), section 439—Revision, Practice of High Court in—Rioting—Common object, Effect or judgment of not stating in charge—Charge, Defect in—Judgment, Defect in—Penal Code (Act XLV of 1860), section 147.

Where certain accused persons were convicted of rioting, and it appeared that the charge did not specify any common object, and that neither the judgment of the Original Court nor that of the Sessions Judge in appeal found what was the common object which made the assembly of which the prisoners were members an unlawful one:

Held, that these defects did not vitiate the proceedings, there being ample evidence on the record to prove what the common object of the assembly was and to justify the conviction for the offence of which the lower Courts had found the accused guilty.

Held, further, that in such a case a rule to show cause why the conviction should not be quashed under the provisions of section 439 of the Code of Criminal Procedure ought not to be granted unless on the materials which are before the Court when the rule is granted, it would be prepared to make the rule absolute if no cause be shown against it.

THE facts of this case were as follows:—

In the village of Timakati was an old-established *hât*, known as the Kumarkhali *hât*. Close to it a new *hât*, the Goalkati *hât*, was recently established. Both these *hâts* were held on the same day. Since the establishment of the new *hât*, strained relations had existed between the two parties. The accused belonged to the party of the owner of the old *hât*. As the complainant was going to the new *hât* the accused and several others seized him. He cried out and a number of the new *hât* people came up to the rescue: a free fight then ensued between the two parties, in the course of which several persons were injured.

The accused were convicted of the offence of rioting by the

* Criminal Motion No. 306 of 1894, against the order passed by R. H. Anderson, Esq., Additional Sessions Judge of Backergunge, dated the 12th of May 1894, affirming the order passed by Babu Baroda Kanto Gangooly, Deputy Magistrate of Barrisal, dated the 30th of April 1894.

1894

BASIRADDI v. QUEEN-EMPRESS.

Deputy Magistrate of Barrisal, the material portion of whose judgment was as follows :—

"The defendants have been charged with having committed rioting near a *hât* which is known as Goalkati *hât;* there was a counter case to this; the counter case has also been tried by me; the complainant in the counter case was the defendant Rohimuddi Howladar. The complainant in this case, *viz.*, Asman Ali Mira, was a defendant in the counter case; there is no doubt as to the fact that a riot took place on the 27th March. The cause of the rioting was the existence of two rival *hâts*, *viz.*, Kumarkhalli *hât* and Goalkati *hât* at a short distance from each other, on two sides of a *khal;* the Kumarakhalli *hât* is an old *hât*, whereas the Goalkati *hât* appears to have been established a few months ago. Both *hâts* sit on the same days, *viz.*, Saturdays and Tuesdays. The defendants belong to a party of Matilal Banerjee, the owner of the greater portion of the Kumarkhalli *hât*. The complainant is backed by Asmatali Khan; according to the prosecution the new *hât* (*i.e.*, Goalkati *hât*) was established by the Goalkati people, as one of the Goalkati people was ill-treated by the Kumarkhalli people at the Kumarkhalli *hât*. Whatever may be the real circumstances which led to the establishment of the new *hât*, this is certain that strained relations have existed between the two parties owing to the existence of the two *hâts*. The accused party is clearly inimical to the interests of the new *hât*. The defendants are men of Matilal Banerjee; they appear to have formed a combination against Asmatali Khan, who back the Goalkati people. The promoters of the new *hât* are no doubt men of Asmatali. The circumstances stated above show clearly that the accused party, including the defendants who are men of Matilal, are inimical to the new *hât*, while the complainant party who are backed by Asmatali are inimical to the interests of the old *hât*.

"Of the witnesses for the prosecution Faizaddi (who was a defendant in the counter case) was wounded in the riot, but the wound was slight. The defendants, *viz.*, Golam Ali, Naimoudi, Basiraddi and Rohimuddi Howladar, bear injuries. The witnesses for the prosecution said that the defendants and several others, who are men of Matilal, went to the west side of the *khal* over an iron bridge to prevent the complainant from going to the new *hât*. The new *hât* is on the west side of the *khal* and the old *hât* (*i.e.*, Kumarkhalli *hât*) is on the east side of the *khal*. The prosecution says that when the complainant was seized by the accused party he cried out, and a number of the new *hât* people came up, and when the latter came up the accused party let go the complainant, but attacked those who came up from the new *hât*, and that the attack consisted in pelting bricks at the men of the complainant party.

"It is admitted by the complainants' witnesses that the men of the complainants' party also pelted bricks at the accused party.

There is no doubt whatever that there was a fight between the two parties. The accused party showed a determination to fight, and so did the complainant party. The evidence of the Sub-Inspector shows that he saw

bricks on the road on both sides of the bridge. The witnesses for the prosecution stated before the police officer that the accused party were on the east side of the bridge, and the complainant party were on the west side of the bridge. The reason for changing the story a little by adding that the accused party went to the west side of the bridge is apparent, the men of the complainant were accused in the counter case, and so it was natural for them to attempt to throw all the blame on the accused party. In a case where both parties are to blame it is but natural that each party should try to throw as much blame as possible on the other party.

The fact that bricks were found on both sides of the bridge shows that the two parties were on opposite sides of the bridge when they pelted bricks at each other; there was undoubtedly a determination to fight on the part of each party: the fight took place, as appears from the Sub-Inspector's evidence, at the iron bridge, which is not far from the two *hâts;* the two parties must have advanced as far as the iron bridge when the fight began; the circumstances disclosed in the evidence do not support the theory that any of the accused party had a right of private defence. The defence is that the complainant party were coming over the bridge towards the old *hât*, but I do not believe that the complainant party came to the east side of the bridge, for the first information lodged by the defendant Rohimuddi Howladar in the counter case clearly shews that the complainant party did not go to the east side of the bridge, and thus it is clear that the accused party had no right of private defence.

"The evidence on the record shows beyond doubt that there was a free fight between the two parties, who pelted bricks and brick-bats at each other; besides the witnesses who were defendants in the counter case, other witnesses, *viz.*, Kali Charn Kumar, Sonamddi, Govindo Chand Kundo, Reazaddi and Uddabkha were examined by the prosecution.

"Of the five defendants there is no doubt whatever as to the guilt of Basiraddi, Rohimuddi Howladar, Naimoudi and Golam Ali. The fact that they all bear injuries which were admittedly received by them in the riot shows that they took part in the fight. They appear to have been hurt by the bricks which were pelted at them when they were pelting bricks, &c., at the complainant party."

The Deputy Magistrate then proceeded to deal with the evidence called by one of the accused to prove an *alibi* and having found that proved acquitted him.

He found all the other accused guilty and convicted them under section 147 of the Penal Code, and sentenced them to rigorous imprisonment for four months, and directed that each be bound over under section 106 of the Code of Criminal Procedure in the sum of Rs. 100 to keep the peace for a period of one year, from the date of the expiry of the sentence of imprisonment.

1894

BASIRADDI v. QUEEN-EMPRESS.

The accused then appealed to the Sessions Judge, who delivered the following judgment :—

"On a consideration of all the evidence I think this conviction is right. I do not believe an attack was made originally on the Kurmarkhalli *hât*. It was too late for that, and it is evident that the case before the Police for the Kumarkhalli men was, that the fighting was all on the west and not the east of the bridge. There is no doubt I think that Asman Ali was siezed by the Kumarkhalli men, possibly for a different reason than he gives, but of the seizure on the west side of the bridge I am satisfied. Then his side turned out and the Kumarkhalli men were driven back. There was a stand at the iron bridge, and when a few men were hurt the fight ceased. Now each of the appellants is shown either to have been concerned in the attack on Asman Ali or to have been one of the second party that came to assist the first party when Asman's side came to his rescue. So that all were members of the unlawful assembly, and were guilty of rioting. I dismiss the appeal."

The accused now moved the High Court to send for the record and quash the conviction under the provisions of section 439 of the Code of Criminal Procedure. The grounds on which the interference of the High Court was sought were—(1), that the facts found did not make out an offence under section 147 ; (2), that both the lower Courts erred in convicting under that section without finding what was the common object of the assembly alleged to be unlawful ; (3), that the order under section 106 of the Code of Criminal Procedure was bad in law ; and, (4), that the sentence was too severe.

Mr. *J. G. Apcar* on these grounds applied to the High Court for a rule.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by—

PETHERAM, C.J. (RAMPINI, J., concurring.)—On the 17th of April last the Deputy Magistrate of Barrisal framed a charge against five persons, by which he charged them with having committed rioting on the 27th of March at Naratham, by forming an unlawful assembly, and assaulting Faisuddi and Mofizuddi, by throwing brickbats in prosecution of that common object. Witnesses were called and examined for the prosecution on the 17th and 18th, for the defence on the 25th, and on the 30th the Deputy Magistrate gave his judgment, by which he convicted four out of the five accused, and sentenced them to four months'

rigorous imprisonment, and to execute bonds to keep the peace for one year. The judgment is long, rather rambling, and, undoubtedly, does not, as it should have done, find what was the common object which made the assembly, of which the prisoners were members, an unlawful one, and after reading it carefully several times, I am by no means sure that I understand now what he thinks the common object was, and I must add that for this reason the judgment is extremely defective. The prisoners appealed to the Judge, who on the 12th of May gave his judgment affirming the conviction and sentences, and I am compelled to say that his judgment is even more defective than that of the Deputy Magistrate, as he not only does not himself find what was the common object of the assembly, but throws doubts on what the Deputy Magistrate may have intended as a finding on the question. In this state of things Mr. Apcar has applied to us for a rule to show cause why the conviction and sentence should not be set aside by this Court, under the powers created by section 439 of the Code of Criminal Procedure, on the ground that the charge does not specify any common object, and that neither of the judgments finds that any common object existed, or what it was, if it did exist We think that we ought not to grant a rule for such a purpose, unless we should be prepared, on the materials on which we grant it, to make it absolute, or, in other words, to acquit the prisoners, if no cause were shown against it, and we certainly should not be prepared to acquit these persons, merely in consequence of the defects which I have pointed out in the charge, and in both the judgments; because it must be evident that notwithstanding them there may be ample material, in the evidence on this record, on which we should ourselves be prepared to convict the prisoners of the offence of rioting, and to inflict the same punishment, which has been inflicted upon them by the Deputy Magistrate. We accordingly invited Mr. Apcar to place the evidence before us with the object of showing us that, upon it, the prisoners ought not to be convicted of rioting. He has done so, to some extent, and we have ourselves since examined it, and so far from thinking that we ought to acquit the prisoners, we think that there is ample evidence here, which we see no

1894

BASIRADDI v. QUEEN-EMPRESS.

reason to disbelieve, that they were members of an assembly, the common object of which was to prevent, by force, traders from resorting to the new *hât*, that the assembly in pursuance of that object did make an attack upon the complainant, who was going to the new *hât*, and afterwards engaged in a battle with the partizans of the owners of the new *hât* who came up to assist him, and moreover that two of the accused actually took part in the first assault on the complainant, and that they all took part in the fight which followed.

This being the state of the evidence, we think that notwithstanding the defects in the charge, and in the judgments, which are very grave, and which call for a distinct expression of disapproval on our part, there is no necessity in the interests of justice for our interference, and there will be no rule.

H. T. H. *Application refused.*

ORIGINAL CIVIL.

1894
June 4.

Before Mr. Justice Sale.

IN THE GOODS OF PREMCHAND MOONSHEE, DECEASED.

BIDHATREE DASSEE *v.* MUTTY LALL GHOSE AND ANOTHER.*

Security for costs—Civil Procedure Code, 1882, section 380—Suit for amount of legacy under will—Suit in nature of administration suit—Discretion of Court under section 380—Interpretation of Acts—"May"—"Shall."

The power given to the Court under section 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. *Degumbari Dabi v. Aushotosh Banerjee* (1), approved of.

Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's costs: *Held*, that the Court would not order the plaintiff, although she was not in possession of any immoveable property within British India, to give security for the costs of the suit.

* Application in Original Civil Suit No. 277 of 1894.

(1) I. L. R., 17 Calc., 613.

A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property does not become thereby "possessed of immoveable property" within the meaning of section 380.

THIS was an application under section 380 of the Code of Civil Procedure that the plaintiff should give security for the costs of the suit, which was one for the recovery of Rs. 8,000, alleged to be payable to the plaintiff as a legatee under the will of Premchand Moonshee. The defendants were the executors who had taken out probate of the will. The application was made in Chambers on the affidavit of the defendant Mutty Lall Ghose, stating that the suit was one for money, and that the plaintiff was a *parda nashin* lady and not possessed of any immoveable property in Britsh India. The application was opposed on behalf of the plaintiff by her son Hira Lall Dutt, who was managing the suit for his mother, and who in his affidavit stated that he was one of the executors of the will of one Woomesh Chunder Mitter, his maternal grandfather, dated 6th February 1892, and that under that will the plaintiff was entitled, as one of the three daughters of the testator, to a one-third share in the residue of all the moveable and immoveable property of the testator after provision had been made for the trusts of the will.

The further material facts are sufficiently stated in the judgment of the Court.

Mr. *N. C. Bose* for the plaintiff.

Mr. *Dunne* for the defendants.

SALE, J.—This is a suit by a legatee to obtain payment of a legacy given to her by the will of her grandfather Prem Chand Moonshee. The will gives various legacies amounting to Rs. 68,000. It also gives an annuity of Rs. 5 a month, and directs that provision be made for the maintenance of a widow, for the support of a charitable dispensary, and for the performance of certain *sradh* ceremonies. It then dedicates the residue of the estate for the *sheba* of the family *thakoor* and appoints three of the testator's sister's sons executors and *shebaits*.

The defendants, being two of the executors, proved the will. The value of the estate as given in their petition for probate is Rs. 1,17,999-5-9.

1894

IN THE GOODS OF PREMCHAND MOONSHEE.

The plaintiff states in her plaint that, notwithstanding repeated demands, she has failed to obtain payment of the legacy from the defendants.

The defendants in their written statement say (1) that the plaintiff is a person of unsound mind and was incapable of instituting the suit and is incapable of maintaining it; (2) that the assets are insufficient; that they offered to pay a proportion of the legacy, not to the legatee herself, she being under disability, but to any person legally authorised to receive the same.

The defendants have now applied under section 380 of the Code for an order requiring the plaintiff to give security for her costs of suit. The application is supported by an affidavit, which states that the suit is for money, that the plaintiff is a *parda nashin* lady, and that she is not possessed of any immoveable property within British India.

The plaintiff's son has in opposition to this application made an affidavit, in which he says that, acting for his mother, he frequently asked the defendants for payment of the legacy; that he was put off from time to time with the promise of payment; that he then caused a letter of demand to be written by an attorney, but received no reply; that the allegation in the written statement of the defendants that the plaintiff is of unsound mind is "wholly false"; that the allegation in the affidavit used in support of this application that the plaintiff is not possessed of any immoveable property within British India is also untrue: and then follows this allegation: "Baboo Woomesh Chunder Mitter who was my grandfather by his will gave and devised all his moveable and immoveable estate in favour of his three daughters, of whom my mother is one, in equal shares for their respective lives, and after their death in favour of their respective heirs *per stirpes*."

There is no dispute that the plaintiff is a *parda nashin* lady, and that this is a suit for "money." But it is said on the part of the plaintiff that, having regard to the terms of her father's will, she is possessed of immoveable property within British India.

Under this will, the immoveable properties left by the plaintiff's father are to be held by the executors upon trust to pay the residue of the income after providing for certain specified

trusts, to his three daughters in equal shares. I think it would be unduly straining the language of the section to hold that the plaintiff, being entitled to a beneficial interest in a part of the surplus income derived from immoveable property, becomes thereby possessed of "sufficient immoveable property" within the meaning of the section. The question then is whether it follows of necessity that the Court is bound to make the order asked for, or whether it has a discretion in exercising the power given under the section.

It has been contended on the part of the defendants that the power is not discretionary but obligatory, and that the word "may" in the latter clause of the section must be read as "shall." I am not aware of any cases now regarded as authorities which can be cited for the proposition that the word "may" is, in any connection, to be read as meaning "shall," though, as explained in the case of *Delhi and London Bank* v. *Orchard* (1), the word "shall" may under certain circumstances be *substituted* for the word "may." On the contrary, in *Julius* v. *Bishop of Oxford* (2) Lord Selborne speaking of the words "may," "it shall be lawful," and the like, says "they are potential and never in themselves significant of any obligation." And Lord Cairns in the same case says of the same words: "They confer a faculty or power, and they do not of themselves do more than confer a faculty or power." So also Cotton, L. J., says: "I think that great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word 'may' it becomes his duty to exercise it"—*In re Baker Nichols* v. *Baker* (3). See also the observations of Jessel, M. R., in *Morgan* v. *Thomas* (4).

No doubt when a power or faculty is given to the Court that it may be exercised for a particular purpose or for the benefit of particular persons under certain specified circumstances, and it is shown that the particular circumstances exist under which it was contemplated that the power should be exercised, then it

(1) I. L. R., 3 Calc., 47 (57.)
(2) L. R., 5 App. Cas., 214.
(3) L. R., 44 Ch. D., 262 (270).
(4) L. R., 9 Q. B. D, 643 (645-6.)

1894

IN THE GOODS OF PREMCHAND MOONSHEE.

may be that an obligation is cast upon the Court to exercise that power. In that sense words which are in themselves *enabling* merely may under certain circumstances impose an obligatory duty.

The object of the section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realizing their costs.

The latter clause of the section was introduced by the Debtors Act (VI of 1888) which prohibits the arrest or imprisonment of a woman in execution of a decree for money, and it is to be observed that it is only in suits for money that the power given under this clause of the section can be exercised. When therefore litigation is harassing and vexatious, or where the real plaintiff is not before the Court, or where, though liable in certain events for the defendant's costs, the plaintiff is a person of no means, in such cases the Court would doubtless exercise this power for the protection of the defendant. But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a mortgage or promissory note, where there is no defence. Is it to be supposed that it was intended that the defendant in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly? It surely was not intended by this section that a perverse litigant should have the right of calling on the Court to assist him in throwing an obstacle vexatiously and unnecessarily in the way of a woman desirous of prosecuting a just claim, which possibly is not even denied.

It seems to me that the power given under the section is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case, and that, unless it is shown that the exercise of its power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. This, I think, was in substance the opinion of Wilson, J., who in a similar application used these words: "I should be very sorry to lay down, and I guard myself against

1894

IN THE GOODS OF PREMCHAND MOONSHEE.

laying down, that this section is imperative on the Court, and that the Courts have no discretion but to order security to be given—*Degumbari Dabi* v. *Aushootosh Banerjee* (1).

Then what are the facts here? The plaintiff as a legatee is entitled to ask for payment of her legacy. The defendants are in possession of the estate, which was originally of large value. They make no reply to the plaintiff's demand for payment. They do not even inform her of the position of the estate, which according to the case now made in their written statement is not sufficient to pay the legacies in full. The plaintiff therefore had no alternative but to seek the assistance of the Court. It is clear that the suit must proceed in the form of an administration suit, and the plaintiff must in the ordinary course obtain a decree for the amount of her legacy without abatement if the assets should prove sufficient; otherwise subject to abatement. In either case the plaintiff, as plaintiff in an administration suit, will be entitled to be paid her costs out of the general estate. In neither case can she be deprived of her costs or be made liable to pay the defendants' costs.

The present application therefore was wholly unnecessary and must be refused with costs.

It is scarcely necessary to add that it was not sought to support this application on any ground connected with the plaintiff's disability alleged in the defendant's written statement. The grounds relied on were merely those indicated in section 380 of the Code.

Application refused.

Attorney for the plaintiff: Mr. *N. C. Bose.*

Attorney for the defendant: Babu *Ukhoy Chunder Dutt.*

J. V. W.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BENI MADHUB NAG (PETITIONER) *v.* MATI LAL DAS, OVERSEER, HOWRAH MUNICIPALITY (OPPOSITE PARTY.)*

1894 *June* 6.

Bengal Municipal Act (Bengal Act V of 1876), section 313—Bye-Law—"Ultra vires"—Bengal Municipal Act (Bengal Act III of 1884), section 2.

* Criminal Motion No. 252 of 1894 against the order passed by Babu Nogendro Nath Pal Chowdhry, Deputy Magistrate of Howrah, dated the 16th of March 1894.

(1) I. L. R., 17 Calc., 610 (613).

1894

BENI MADHUB NAG v. MATI LAL DAS.

Where a Municipality passed a bye-law purporting to be made under the provisions of section 313 of Bengal Act V of 1876, which was duly sanctioned by the local Government, to the effect that persons, failing to trim trees overhanging tanks which were likely to foul the water with their falling leaves, after service of notice on them to that effect, should be liable to a penalty, and where subsequent to the repeal of that Act by Bengal Act III of 1884 a person was convicted and fined for having disobeyed such bye-law,

Held, that the conviction was bad, as the bye-law was not one authorised by the terms of section 313, and was consequently *ultra vires*, and that section 2 of Bengal Act III of 1884 could not make valid a bye-law which was originally invalid.

THE petitioner in this case was charged at the instance of an overseer of the Howrah Municipality with failing to comply with the terms of a notice served on him requiring him to cut and trim the branches of certain trees belonging to him which overhung a tank belonging to a private person.

The notice was in the following terms :—

"Take notice that you are hereby required within three days from the date of service hereof to cut your *sujna* trees overhanging the tank at Khetter Banerjee's lane belonging to Prosonno Coomar Nag, as the said trees are liable to foul the water of the above tank by the leaves thereof falling into it. If you fail to do so within the term specified above you will be liable to a fine of Rs. 10 and to a daily fine of Rs. 2 until the terms of this notice are complied with.

(Sd.) N. S. DUTT,
Dated the 30th November 1893. *Vice-Chairman.*"

This notice purported to be issued under bye-law No. 83. On receipt of this notice the petitioner applied to the Vice-Chairman to be informed where the bye-law in question was to be found, as no such bye-law existed amongst those passed by the Howrah Municipality and sanctioned by the local Government under Act III of 1884, and in reply he was informed that the bye-law in question was published in the *Calcutta Gazette* of the 14th January 1880, and it appeared to have been passed and sanctioned under the provisions of section 313 of Bengal Act V of 1876.

The bye-law was in the following terms :—

"Bye-law 83.—The Commissioners may give notice in writing to the owner of any trees or shrubs overhanging any tank and

liable to foul the water thereof to cut or trim the same in such a manner as that they should not overhang the tank.

"Whoever fails to comply with such requisition shall be liable to a fine which shall not exceed Rs. 10 and to a daily fine which shall not exceed Rs. 2 until such requisition be complied with."

The petitioner objected that the bye-law was not in existence and had no application, the Act under which it was passed having been repealed and new bye-laws having been passed and sanctioned under the new Act; he also objected that the prosecution had not been sanctioned by the Chairman, and raised other defences which it is not material to notice here.

The Deputy Magistrate overruled all the objections, and convicted the petitioner sentencing him to a fine of Rs. 5.

The petitioner then applied to the High Court to set aside the conviction on the ground that the bye-law was *ultra vires*, not being warranted by the provisions of Bengal Act V of 1876; that even if once good it had no force after the repeal of that Act; that it could only have been good in respect of Municipal tanks and never could refer to a private tank; and that the prosecution was bad inasmuch as the sanction of the Chairman had never been obtained or specifically given as required by law.

On the application a rule was issued which now came on for hearing.

Mr. *M. Ghose* and Babu *Atulya Charan Bose* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Leith*) for the opposite party.

The arguments are sufficiently stated in the judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) which was as follows:—

The petitioner Beni Madhub Nag has been convicted under bye-law 83 of the bye-laws of the Howrah Municipality for failing, in pursuance of a notice issued to him, to cut certain branches of a tree belonging to him which are alleged to overhang a tank belonging to a private individual and to be likely to foul its water. He has been sentenced to pay a fine of Rs. 5.

Mr. Ghose on behalf of the petitioner contends that this bye-law, which purports to have been framed under the provisions of section 313, Bengal Act V of 1876, is not warranted by the provisions of that section, and therefore cannot be legally enforced.

1894

BENI MADHUB NAG v. MATI LAL DAS.

The bye-law runs as follows :—(see *ante* p. 838.)

Now, on looking at the provisions of section 313 of Bengal Act V of 1876 it is clear that this bye-law is not one such as the Commissioners of Municipalities were authorised to frame under this section. Section 2 of Bengal Act III of 1884 no doubt lays down that all bye-laws prescribed under any enactment repealed by that Act shall be deemed to have been prescribed under that Act, and this bye-law 83 has undoubtedly been prescribed and sanctioned by the local Government under Bengal Act V of 1876. But Mr. Ghose contends that the word "prescribed" in section 2 of Act III of 1884 must mean "duly" or "lawfully prescribed," and that section 2 of Act III of 1884 cannot make *intra vires* under section III of 1884 a bye-law which is obviously *ultra vires* under Act V of 1876. This argument appears to us to be sound, and we think the objection raised is fatal to the conviction. We accordingly set it aside and direct that the fine, if paid, be refunded.

H. T. H. *Conviction quashed.*

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1894 *June* 12.

RAM KANYE AUDHICARY *v.* CALLY CHURN DEY AND ANOTHER.*

Interest—Rule of damdupat—Hindu law—Usury—Account directed by decree in mortgage suit between Hindus—Interest for periods before, during and after the six months allowed by decree for redemption.

Where a mortgage decree, in a suit between Hindus, directed an account to be taken of what was due to the plaintiff for principal and interest, the latter to be computed at the contract rate for six months, provided for redemption on payment of the amount due within the six months, and directed in case of default of payment that interest due be added to the principal sum, interest thereafter to be computed on the aggregate amount at 6 per cent; *Held*, that in taking the account the rule of *damdupat* was rightly applied to the interest accruing on the mortgage debt both previous to and during the six months allowed for redemption, notwithstanding the form of the decree, (*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose* (1) referred to); and that the same rule was applicable to the interest accruing after the period of six months had elapsed.

* Original Civil Suit No. 63 of 1892.

(1) I. L. R., 14 Calc., 781.

When the rule of *damdupat* has once been applied in any account, directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time.

THIS was a suit on a mortgage, dated 26th January 1884, in which the plaintiff and defendants were Hindus. By the decree made in the suit, dated 2nd June 1892, it was referred to the Registrar to take an account of what would be due to the plaintiff and the defendant Doorga Das Ghose, a second mortgagee, under a mortgage dated 19th August 1890, respectively, at the end of six months from the date when the report of the Registrar should be countersigned by a Judge, for principal and interest on their respective mortgages, and to tax the costs; and it was ordered that on the defendant Cally Churn Dey paying what was found by the Registrar's report to be due on the respective mortgages with costs and interest at 5 per cent. per annum the mortgaged properties should be reconveyed, but in the default of such payment the principal and interest found due should at the end of the six months be added together, and thereafter bear interest at 6 per cent. per annum until realization; and it was also ordered that the mortgaged property should be sold by the Registrar, and the sale proceeds be paid into Court to the credit of the suit in order that they might be applied in payment of the amounts payable to the plaintiff and the defendant Doorga Das Ghose respectively in the manner provided by the decree. The Registrar on 25th August 1892 made his report, which was countersigned by TREVELYAN, J., and by the report it was found that on 5th March 1893 (*i.e.*, six months after the report had been countersigned) there would be due to the plaintiff Rs. 6,000 for principal and interest on his mortgage, and to the defendant Doorga Das Ghose Rs. 3,386-6-2 for principal and interest on his mortgage. Default in payment was made by the mortgagor, and under an order of Court, dated 15th April 1893, the Registrar put the mortgaged properties up for sale on 25th November 1893, and they were purchased by Deva Prosad Sarbadhicari for Rs. 10,250 which was paid by the purchaser into Court to the credit of the suit. The sale was confirmed and a certificate of sale issued, and there was in

1894

RAM KANYE AUDHICARY v. CALLY CHURN DEY.

Court to the credit of the suit Rs. 9,767-15-4. The plaintiff's taxed costs amounted to Rs. 597-4-3, and the plaintiff now applied that that sum, together with the amount found due to him for principal and interest on his mortgage, should be paid to him from the sum in Court to the credit of the suit.

The application came on in Chambers, the defendant Doorga Das Ghose, the second mortgagee, appearing at the hearing.

SALE, J—This is a suit between Hindus on a mortgage to secure the repayment of a loan with interest. There is a second mortgage which was executed in favour of the second defendant, but no question arises as to that mortgage.

The decree, so far as it relates to the plaintiff, directs an account to be taken of what is due to him for principal and interest, the latter to be computed at the contract rate for six months. It then directs that upon payment within six months of what shall be due for principal and interest, and allowed on taxation for costs, with interest on such costs at six per cent. per annum, the property under mortgage be retransferred: but that in default of payment the interest computed at the contract rate for six months be added to the principal sum, that thereafter interest be computed on the aggregate amount, that the property under mortgage be sold, that the sale proceeds be paid into Court and applied first in payment of the amount payable to the plaintiff under the decree for principal, interest and costs with interest thereon.

The Registrar took the account, and finding that the interest exceeded the principal sum, he allowed for interest a sum equal to the principal sum, and disallowed the rest under the rule of *damdupat*. The report of the Registrar was accepted by the parties.

Default in payment having been made, a final order for sale was obtained, under which the property was sold by the Registrar, and the sale proceeds were paid into Court to be applied as directed by the decree. The plaintiff, as first mortgagee, being entitled to be paid in priority, has applied for payment of the principal and interest allowed in the report, with interest on the aggregate amount at six per cent. and also of the taxed costs with interest thereon at six per cent.

The application is ma le on summons to the second mortgagee who has appeared. The mortgagor was not served with the summons and has not appeared.

In support of the application the case of *Balkrishna Bhalchandra* v. *Gopal Raghunath* (1) was cited. In that case the plaintiff obtained a money decree with interest. After some years, application was made for execution. The interest payable under the decree exceeded the principal sum, and the question was whether the amount of the excess should not be disallowed under the rule of *damdupat*. The Court held that the rule of *damdupat* did not apply to interest recoverable in execution.

In the present case the rule of *damdupat* has been applied, and there is no question that it has been rightly applied to the interest accruing on the mortgage debt both previous to and *during* the period of six months allowed for redemption, notwithstanding the form of the decree—*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose* (2). But it is contended that this should not prevent effect being given to the decree so far as it directs that at the end of six months the interest due be added to the principal sum, and that thereafter interest be computed on the aggregate amount at six per cent. This direction as to the allowance of interest at the contract rate on the aggregate amount is a usual direction inserted as of course in all decrees for an account in mortgage suits without having in view the rule of *damdupat*. If this form of decree does not prevent the application of the rule to the interest accruing due during the period of six months, it is difficult to see why it should prevent the further operation of the rule so as to admit of interest being computed after the period of six months on the aggregate amount of principal sum and interest allowed in the report. It appears to me that when the rule of *damdupat* is once applied in any account, directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time.

(1) I. L. R., 1 Bom., 73. (2) I. L. R., 14 Calc., 781.

1894

RAM KANYE AUDHICARY v. CALLY CHURN DEY.

Interest on the taxed costs of suit stands on a different footing, but that has been allowed in the report and is not in question.

This view of the operation of the rule of *damdupat* appears to have been taken by the Bombay Court in the case of *Ramchandra Mankeshwar* v. *Bhimrav Ravji* (1).

There will be an order in terms of the summons except as to further interest.

Attorneys for the plaintiff: Messrs. *Wilson & Chatterjee.*

Attorney for the defendant Doorga Das Ghose: Mr. *Rutter.*

J. V. W.

APPELLATE CIVIL.

1894. *May* 28.

Before Sir William Comer Petheram, Knight, Chief Justice, Mr. Justice Beverley and Mr. Justice Ameer Ali.

GOSSAIN CHUTTURBHOOJ DUT AND OTHERS (DEFENDANTS) *v.* ISHRI MUL AND OTHERS (PLAINTIFFS.)*

Sale for arrears of Revenue—Act XI of 1859, sections 6, 13, 14 and 33—Proceedings when share of estate is not sold at auction sale—Payment of arrears before sale without obtaining exemption from sale—Ground for annulling sale not declared and specified in appeal to Commissioner.

The plaintiffs and defendants were sharers in a certain estate, the plaintiffs being owners of a joint share, and the defendants the owners of other shares, in respect of which separate accounts had been opened in the Collector's register. The plaintiffs in March 1890 made default in the payment of Government revenue for their share, and it was advertised to be put up for sale on 18th September 1890, under sections 6 and 13 of Act XI of 1859, for recovery of the amount due, Rs. 18-6. On the 16th September the plaintiff paid into the treasury of the Collectorate the amount of arrears due, and made an application that the joint share might be exempted from sale; receipts were given for the amount paid in, but no order was made on the application, and the share was not exempted from sale. On the 16th September the joint share was put up for sale, but there being no bids, the sale was postponed, and on the same day the Collector made an order under section 14 of Act XI of 1859 that, unless the arrears were paid by the other sharers (the defendants) within ten days, the whole estate would be put up for sale. Notices of this order, provided for by a rule made under the Act by the Board of Revenue, were given to the serving peon on

* Appeal from Original Decree No. 325 of 1892, against the decree of Babu Saroda Prosad Bhattacharjee, Subordinate Judge of Sarun, dated the 18th of June 1892.

(1) I. L. R., 1 Bom., 577 (580.)

2nd October for service on the defendants, and the arrears were paid in by some of the defendants on the 4th and by others on the 7th October, and eventually the Collector, acting under section 14 of the Act, granted on the 5th December 1890 a certificate of purchase, and gave delivery of possession to the defendants. The plaintiffs appealed to the Commissioner, but their appeal was rejected on 10th March 1891. In a suit for a declaration that the proceedings taken by the Collector under section 14 of the Act were illegal, and conveyed no title to the defendants, and for possession of the joint share with mesne profits: *Held* by PETHERAM, C.J., and BEVERLEY, J. (AMEER ALI, J., dissenting) that the Collector not having exempted the share from sale, the payment by the plaintiff of the arrears on 16th September was no bar to the proceedings taken under section 14 of the Act.

Held, also, that the defendants' purchase was not made invalid by the fact of their not having paid in the arrears within ten days from the 18th September, the day fixed for the sale: the ten days in section 14 run from the time when notice of the Collector's order is given to the other sharers, and not from the date of the sale. *Held*, further, that it was not open to the plaintiffs to take this latter objection, as it was not declared and specified in their grounds of appeal to the Commissioner in accordance with section 33 of the Act. *Gobind Lal Roy* v. *Ramjanam Misser* (1) followed.

Per AMEER ALI, J., *contra*

Per PETHERAM, C. J.—Section 33 applies to sales under section 14 as well as to sales by public auction under the Act.

Semble.—There is nothing in Act XI of 1859 which would have prevented the plaintiffs from purchasing the share themselves when it was put up for sale on 18th September.

Per BEVERLEY, J.—Under section 6 of the Act the sale, if it had taken place on the 18th September, would have conveyed a good title to the defendants; and under section 14 they are expressly declared to have "the same rights as if the share had been purchased by them at the sale."

Per AMEER ALI, J.—The proceedings provided for by section 14 do not apply in a case where there have been no bids at the sale. Section 33 is not applicable to a transfer by the Collector of the defaulting share under section 14; the sale contemplated by section 33 and referred to by the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser* (1) is a public sale held at a place prescribed by the proper authorities at which there are bidders and a possibility of competition.

THE plaintiffs in the suit out of which this appeal arose were the proprietors of a joint share in a *mehal* called Sonbursa (the total yearly *jama* on which was Rs. 720), which share formed a 6-anna 8-pie share of the *mehal* at a *jama* of Rs. 300; and the defendants were the owners of the remaining 9-annas 4-pie

(1) I. L. R., 21 Calc., 70.

1894

GOSSAIN CHUTTUR-BHOOJ DUT v. ISHRI MUL.

share at a *jama* of Rs. 420, in respect of which they had opened three separate accounts in the Collector's register under section 10 of Act XI of 1859.

The joint share which was owned by the plaintiffs was, in consequence of there being due on it arrears of Government revenue Rs. 18-6 for the instalment due for March 1890, advertized to be put up for sale on the 18th September 1890 for recovery of the amount due. On 16th September the whole amount of arrears due were paid into the treasury of the Collectorate on behalf of the plaintiffs, and at the same time an application was put in that the estate might be exempted from sale. Receipts were given for the amount paid in, but no order was passed on the application. On the 18th September the plaintiff's share was put up for sale, but there were no bidders for it, and the following record was made by the Collector :—

"No bid : proceedings to be taken under section 14.

(Sd.) J. A. B.
18th September 1890."

"It is ordered—

"That the record-keeper do without delay write down the names of the proprietors of the *khatas* of this *mehal* with their residences.

Dated 18th September 1890."

On the same day the following notice under section 14 of Act XI of 1859 was issued by the Collector to the defendants under a rule of the Board of Revenue, which provides for such notice being given :—

"Whereas joint *mehal* Sonbursa, *pergana* Manghi, bearing *towzi* No. 3653 and a *jama* of Rs. 300 was advertized for auction-sale fixed for 18th September 1890, for arrears of Government revenue on account of instalment of 28th March 1890, but at the time it was put up for auction-sale no one made any bid ; therefore the auction-sale was postponed and notice issued by order of this date,—you will under section 14, Act XI of 1859, pay in the whole of the arrear against the aforesaid share within ten days, and purchase the aforesaid share ; otherwise the entire *mehal* will be sold by auction and the arrear realized."

This notice was issued to the serving peon for service on the 2nd October, but of the precise dates when it was served on the defendants there was no proof. On the 4th October the amount of arrears due was deposited by some of the defendants and by others of the defendants on the 7th October, and event-

ually the Collector on 5th December 1890 granted a sale-certificate to the defendants as being the purchasers, and made possession of the property over to them.

The plaintiffs previously to this on 1st October had presented a petition objecting to the proceedings which had been taken under section 14 as being illegal, and stating that no arrears were due, but this petition was rejected by the Collector on 6th October 1890. The plaintiffs also appealed to the Commissioner from the Collector's order of 5th December, but their appeal was rejected on 10th March 1891. In the appeal to the Commissioner no objection was taken that the defendants had not paid in the arrears within the period of ten days from the Collector's order to that effect.

The plaintiffs brought this suit for a declaration that the defendants did not acquire any right in the joint share of the *mehal* by their purchase under colour of section 14 of Act XI of 1859 as against the plaintiffs, and for possession of the joint share with mesne profits ; and they submitted (*inter alia*) that the proceedings taken by the Collector under that section were wholly unauthorized and illegal, and that they had sustained substantial injury by reason of such proceedings.

The defence, so far as it is material to this report, was that the proceedings of the Collector were lawful and valid ; that the defendants were consequently lawfully in possession of the joint share of the *mehal* ; and that the plaintiffs were not entitled to urge in support of their suit any ground which they omitted to take in their appeal to the Commissioner.

The Subordinate Judge found that all arrears had been paid off on the 16th September, and that on the day of sale there were no arrears due to justify the proceedings under section 14 of Act XI of 1859, and that the proceedings taken by the Collector under that section were consequently illegal, and the defendants acquired no title under them. He passed a decree, therefore, in favour of the plaintiffs.

The defendants appealed to the High Court.

Moulvie *Mahomed Yusuff* and Babu *Akhoy Kumar Banerjee* for the appellants.

Mr. *Dunne* and Moulvie *Serajul Islam* for the respondents.

1894

GOSSAIN CHUTTUR-BHOOJ DUT v. ISHRI MUL.

The appeal came on before BEVERLEY and AMEER ALI, JJ., who differed in opinion, and the case was referred under section 575 of the Civil Procedure Code to PETHERAM, C.J.

The following judgments were delivered :—

AMEER ALI, J.—This appeal arises out of a suit brought by the plaintiffs under the following circumstances :—

A revenue-paying estate called *mehal* Sonbursa was jointly owned by a number of proprietors, three sets of whom appear to have opened, under section 10 of Act XI of 1859, separate accounts in the Collector's Register for the payment of their respective shares of the Government revenue. The plaintiffs, who were the proprietors of the remaining share of the estate, were liable for the share of the revenue in respect thereof.

A default having been made in the payment of the March instalment of the revenue due for the share belonging to the plaintiffs, it was advertized by the Collector under the provisions of section 13 of the Act for sale on the 18th of September 1890.

On the 16th of September the plaintiffs paid into the Collectorate the amount due and received a *chalan* or receipt therefor. No order, however, was made by the Collector under section 18 exempting the property from sale. On the 18th the plaintiff's share in the *mehal* was put up to sale as advertized, but there being no bidders, the Collector recorded an order in the following terms (*see ante p* 846) :—

On the same day the following notice was issued upon the other sharers in the *mehal* (*see ante p* 846) :—

On the 4th and 7th of October respectively the defendants deposited in the Collectorate the amount of arrear for which the plaintiff's share was advertized for sale, and on the 5th of December the Collector gave the defendants, as purchasers of the plaintiff's share, a certificate under section 14 of the Act. The plaintiffs preferred an appeal to the Commissioner, who rejected the same on the 10th of March 1891.

They thereupon brought this suit for a declaration that the proceedings taken by the Collector under section 14 of the Act were unauthorised and illegal and conveyed no title to the defendants, and for recovery of possession of the property.

The Subordinate Judge has decreed the plaintiffs' claim mainly on two grounds: In the first place he is of opinion that the payment of the arrear on the 16th of September was a bar to a proceeding under section 14 under which the Collector purported to convey to the sharers the plaintiff's share. In the second place, he has held that, as the defendants did not pay in the amount of arrear within ten days from the date on which the property was put up to auction, the transfer was illegal and void.

The defendants have appealed to this Court, and the learned pleader who appeared on their behalf took exception to both the conclusions of the Subordinate Judge. He contended that as the Collector did not accept the payment made by the plaintiffs on the 16th of September, and did not exempt the property from sale, that payment could not be a bar to the transfer to the defendants; and, secondly, that the period of ten days specified in section 14 should be taken from service of notice and not from the date of the auction sale, and consequently the payment made by the defendants was within time.

I will take up the latter question first as it seems to me the decision of the case turns upon it.

Now, it is quite clear that the opening of separate accounts by one or more shareholders does not absolve the joint estate from liability for arrears of revenue in respect of any portion of the *mehal*; it only gives to the shareholders the advantage of throwing the burden primarily on the share from which the arrear is due. The estate remains liable all the same. A reference to section 13 of the Act makes this perfectly clear. The first part of that section run thus:—

"Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which according to the separate accounts an arrear of revenue may be due."

Then follows the provision relating to the exemption of the share or shares from which no arrear is due:—

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL.

"In all such cases notice of the intention of excluding the share or shares from which no arrear is due shall be given in the advertisement of sale prescribed in section 6 of this Act."

Section 14 shows the position of the other shareholders. It runs thus:—

"If in any case of a sale held according to the provisions of the last preceding section the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector or other officer as aforesaid shall stop the sale and shall declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers or one or more of them shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share."

It is clear from these two sections that so long as the defaulting share is not sold, the liability of the joint estate for the Government revenue continues, only in the first instance the defaulting share or shares must be put up to sale; if that proves infructuous then the Collector "shall declare that the entire estate will be put to sale, &c."

There is no provision in the section about any notice to the other recorded sharer or sharers. The Collector is required simply to declare at the time he stops the sale that the entire estate will be put up to sale, in other words that the existing liability would be enforced against the entire estate unless the other sharers or one or more of them should withen ten days purchase the share in arrear by paying to Government the whole amount due. The reason for not requiring any notice of such declaration is obvious from what I have already stated. The entire estate is liable for the revenue, only the particular share is to be put up to sale first; the advertisement of sale prescribed in section 6 is duly published at the Collector's office, and though in that document the intention of excluding the share or shares from which no arrear was due is notified, owners of the latter know from the notification that the entire estate is in jeopardy, and that the exemption of their shares is only conditional, and that in case the highest bid does not cover the arrear due to Government, the entire estate will be sold unless the other sharers pay in the amount within a limited time and

take over the property. Therefore, so far as the liability to sale of the entire estate is concerned, each sharer has the knowledge when the advertisement or notification is issued. It is for them to see whether the defaulting share covers the arrear or not. The law assumes that the other sharers are present and know whether the highest bid reaches that point; and for this reason makes no provision for a notice of the Collector's declaration, which must be made simultaneously with the stoppage of the infructuous sale.

It has been contended that the Board of Revenue has framed a rule providing for the issue of a notice. It is a commendable rule, if I may say so, showing that the Government is not disposed to apply the sale law, which is drastic enough, more harshly than it can help, and therefore provides for the issue of a notice to the other sharers. But the Board cannot, by any rule, supplement the law which is complete in itself. Nor can a remedial executive rule designed for one purpose, that is, for protecting from sale the shares of others than the defaulting sharer without some notice, be construed as enlarging the time fixed for payment by the sharers, and thus depriving a man of his property without the sanction of the law.

If the entire estate is sold without the notice required by the Board's rule, or within ten days from service of such notice, the sharers not in default may, on that ground, obtain a reversal of the sale, but that rule, to my mind, will not warrant the Collector handing over one man's property to another without strict compliance with the law under which alone that power can be exercised. As I understand section 14 of Act XI of 1859 it gives to the other sharers a statutory right of pre-emption so to speak in respect of the defaulting share. The right is of an exceptional character; it entitles them to obtain the property which may be of considerable value for the merest trifle without any competition. In order to claim such a right and to enable the Collector to give effect to such a claim they must show a strict compliance with the provisions of the law.

It is to be observed that the section speaks of the "highest offer," not equalling the amount of arrear due. To my mind these words show that the law contemplates the exercise of the

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL.

exceptional power given to the Collector under section 14 in a case where the property is either so valueless or so peculiarly situated that at a competitive sale the highest offer does not, in fact, reach the amount due; in other words, after it has been tested in open market by actual bidding that the property could not fetch the amount in question. It does not in my opinion contemplate a case where from some accidental reasons there have been no bids. It is impossible to conceive that but for some accidental circumstance there would be no offer at all even to the extent of 18 rupees for the property in suit, which the Judge finds to be of considerable value.

I am, therefore, of opinion that the Subordinate Judge is right in holding that the defendants, not having made the payment within ten days from the 18th of September 1890, acquired no right whatsoever to the property which was purported to be conveyed to them by the Collector, and that his proceeding is illegal and void and without jurisdiction.

If the intendment of the law be that the declaration of the Collector should come to the knowledge of the sharers, there is nothing to show that it must be by a formal written notice. I take it that if the defendants had notice or information of the declaration made by the Collector on the 18th, the absence of a written notice would not absolve the estate from its liability to sale.

There is absolutely nothing on the record to show that the defendants had no knowledge of the Collector's declaration on the 18th, or in fact when they first became aware of it.

Assuming, however, as it is contended on behalf of the appellants, that a formal written notice was necessary, I find that it bears date the 18th of September, the date on which the defaulting share was put up to sale. There is not an iota of evidence as to when the notices were received by the defendants. The endorsements on the notices in my opinion are no evidence of the facts they purport to mention; it is perfectly possible that they may be post-dated, which is by no means uncommon. The peon who served the notice has not been examined, nor have the defendants given their evidence to show when they received the notices. Nor is there the smallest explanation why the notices,

dated as they are the 18th of September, were not issued until the 2nd of October. If the defendants want to avail themselves of the strict letter of the law, they must satisfy by strict proof that they came within its provisions. Courts of Justice are often compelled to enforce the law in all its stringency regardless of all considerations of individual hardship or injury to private rights, but they are not constrained to make every assumption in favour of the co-sharer claiming an exceptional right.

But it is objected on behalf of the defendants that inasmuch as this ground was not "declared and specified" in the appeal before the Commissioner the plaintiffs are precluded under the provisions of section 33 from raising it in the Civil Court; and in support of their contention they rely on the case of *Gobind Lal Roy* v. *Ramjanam Misser* (1). This brings me to the consideration of the question whether the transfer by the Collector of the defaulting share to the co-sharers is a "sale" coming within the purview of section 33. That section so far as is material for the purposes of the present discussion runs as follows: "No sale for arrears of revenue or other demands, realizable in the same manner as arrears of revenue are realizable made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner under section 25 of this Act." Their Lordships of the Privy Council in the case upon which the defendants rely express themselves thus: "Giving, however, full weight to these considerations their Lordships, having regard to the scheme of the Act and the express direction contained in section 33, are of opinion that in every case where a sale for arrears of revenue is impeached as being 'contrary to the provisions' of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner." And then follow the significant words: "In the opinion of their Lordships a sale is a sale made under Act XI of 1859 within the

(1) I. L. R., 21 Calc., 70.

1894

GOSSAIN CHUTTUR-BHOOJ DUT v. ISHRI MUL.

meaning of that Act, when it is a sale for arrears of Government revenue held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

The question then is—Is a purchase under section 14 "a sale held by the Collector under the Act?" Section 19 tells us how sales are to be made or held. "Sales shall ordinarily be made by the Collector or other officer as aforesaid in the Land Revenue office at the *sudder* station of the district; provided however that it shall be competent to the Board of Revenue to prescribe a place for holding sales other than such office whenever they shall consider it beneficial to the parties concerned." Sections 20 and 21 relate to the procedure to be observed at the time of making "the sale." Section 22 says: "The party who shall be declared the purchaser of an estate or share of an estate at any such public sale as aforesaid shall be required to deposit immediately, or as soon after the conclusion of the sale of the estate or share as the Collector or other officer aforesaid, &c." Compare also the phraseology of section 14 "if such purchase be completed" with that of section 28 "immediately upon a sale becoming final." These and the succeeding sections show clearly that the sale contemplated in section 33 and referred to by their Lordships is a public sale held either in the Land Revenue office at the *sudder* station of the district or any other place, which the Board may prescribe whenever they consider it beneficial to the parties concerned—a sale at which bidders are or can be present, and in which there is a possibility of competition; otherwise the provisions of section 19 become meaningless, and the reference to what is "beneficial to the parties concerned" superfluous. It could never have been the intention of the Legislature to designate the dealing under section 14 as a "sale" under the Act. Section 14 itself shows clearly to my mind the distinction between a "sale" under the Act and the proceeding by which the Collector conveys the defaulting share to the sharers. The latter clause of the section runs thus: "If such purchase be completed, the Collector, or other officer as aforesaid, shall give such certificate and delivery

of possession as are provided for in sections 18 and 19 of this Act to the purchaser or purchasers, who shall have the same rights as if the share had been purchased by him or them at the sale. If no such purchase be made within ten days as aforesaid the entire estate shall be sold after notification for such period and publication in such manner as is prescribed in section 6 of this Act." It gives on the completion of the "purchase" and the delivery of the certificate to the purchaser or purchasers the same rights as if the share had been purchased by him or them at "the sale"—the sale which was to be held under section 13 in accordance with the provisions of section 6. If the purchase under section 14 was a "sale" it would not only be unnecessary but absurd to say that the purchasers would have the same rights as if they had purchased at "the sale" which was advertised in accordance with the provisions of section 6, and which could only be held under the guarantees of section 19.

As I mentioned before, to my mind section 14 gives to the sharers a statutory right of pre-emption, so to speak, subject to a statutory obligation. It gives to the Collector, subject to the same conditions, the power of handing over the property of one who was primarily liable for the arrears which had fallen due in respect of the *estate* to others equally liable, though their liability can be enforced only at a later stage. All the elements which constitute a "sale" are wanting here; there is no competition, there are no bidders, no advertisements and no publicity, and the price is the arrear due which may be a mere trifle compared to the value of the property. What their Lordships in the Privy Council had in view was, as it seems to me, the case of a person buying in open market at a "public sale" in competition with others. I think therefore the objection of the defendants founded on section 33 is untenable.

In the view I take of the case it is unnecessary to consider whether the payment made by the plaintiffs on the 16th of September was or was not a bar to the transfer by the Collector. But as the question has been raised and discussed I think it better to express my opinion on the point.

As I have already mentioned, in my opinion the transfer under section 14 is not a sale under the Act. Section 6 lays down the

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL.

procedure for issuing notifications, &c., and provides that:—"Except as hereinafter provided all estates or shares of estates so specified shall, on the day notified for sale, or on the day or days following, be put up to public auction by, and in the presence of, the Collector or other officer as aforesaid, and shall be sold to the highest bidder, and no payment, or tender of payment, made after sunset of the said latest day of payment shall bar or interfere with the sale either at the time of sale or after its conclusion." The sale referred to at the end of the section is the public sale by auction, the procedure of which is laid down in sections 19, 20 and 21. Section 8 declares as follows:—

"No claim to abatement or remission of revenue, unless the same shall have been allowed by the authority of Government, and no private demand or cause of action whatever held or supposed to be held by any defaulter against Government, shall bar or render void or voidable a sale under this Act; nor shall the plea that money belonging to the defaulter and sufficient to pay the arrear of revenue due was in the Collector's hands bar or render void or voidable a sale under this Act, unless such money stand in the defaulter's name alone and without dispute, and unless, after application in due time made by the defaulter or after the written agreement provided for in section 15 of this Act, the Collector shall have neglected or refused on insufficient grounds to transfer it in payment of the arrear of revenue due," and section 18, so far as is material, runs thus:—"It shall be competent to the Collector or other officer as aforesaid at any time before the sale of an estate or share of an estate shall have commenced, to exempt such estate or share from sale, and in like manner it shall be competent to the Commissioner of Revenue, at any time before the sale of an estate or share of an estate shall have commenced, to exempt such estate or share from sale, by a special order to the Collector or other officer as aforesaid to that effect in each case, and no such sale shall be legal if held after the receipt of such order of exemption, provided, however, and it is hereby enacted that the Collector or other officer as aforesaid, or the Commissioner, shall duly record in a proceeding the reason for granting such exemption, and provided also that an order for exemption so issued by the Commis-

sioner shall not affect the legality of a sale which may have taken place before the receipt by the Collector or other officer as aforesaid of the order of exemption."

Throughout these sections the sale referred to is the public sale by auction. The payment on the 16th, in the absence of an order of exemption under section 18, would have been clearly no bar to a sale on the 18th as advertised; but there is not a word anywhere throughout the Act that an actual payment of the arrear, though after due date, should not be a bar to the Collector proceeding under section 14 to hand over the property without any formality or guarantees that surround a public sale to the other sharers. In the absence of any provision to that effect or any authority I do not feel inclined to stretch the law beyond its legitimate extent. On the whole, therefore, I agree with the lower Court on both the points, and would accordingly dismiss this appeal with costs.

BEVERLEY, J.—The plaintiffs in this suit were the owners of a share known as the *ijmali* or joint share in a certain estate. The defendants are the owners of three other shares in the same estate, in respect of which separate accounts have been opened. In 1890 the plaintiffs defaulted in payment of the Government revenue due upon their share, and their share was accordingly advertised to be sold on the 18th September under sections 6 and 13 of Act XI of 1859. On the 16th September the plaintiffs tendered the amount in arrear and actually paid it into the Treasury; but the Collector refused to exempt the share from sale, and in fact proceeded to put it up to sale on the 18th. There being no bid, however, the sale was stopped, and the Collector made an order under section 14 of the Act that unless the arrear was paid in within ten days by the other recorded sharers, the entire estate would be put up to sale. The arrear was paid in by some of the defendants on the 4th October and by others on the 7th October, and accordingly the Collector under section 14 of the Act granted a certificate of purchase and delivery of possession to the defendants.

The plaintiffs thereupon instituted the present suit—(1) for a declaration that the entire proceedings under the Act were illegal and invalid; (2) for recovery of possession of the share; and (3) for mesne profits.

1894

GOSSAIN CHUTTUR-BHOOJ DUT v. ISHRI MUL.

The lower Court has decreed the plaintiffs' suit on two grounds: In the first place, the Subordinate Judge has held that the plaintiffs having paid up the arrear on the 16th September, there was no arrear due when the Collector purported to proceed under section 14, and that his action was for that reason illegal and invalid. In the second place, he has held that as the arrear was not paid in by the defendants within ten days from September 18th, they acquired no title by their alleged purchase under section 14.

From this decision the defendants appeal on the ground that the Subordinate Judge is wrong in law on both points, and I am of opinion that the appeal must be allowed.

In the first place, I am of opinion that the Subordinate Judge is wrong in assuming that there was no arrear due after the 16th September. The money was no doubt paid into the Treasury on that date, and an application was made to the Collector to receive the amount on account of the arrear and to exempt the share from sale. But an "arrear of revenue" is defined by section 2 of the Act, and there is nothing whatever in the Act to give support to the theory that subsequent tender by the defaulter of a sum which has once become an arrear has the effect of cancelling that arrear, so that it no longer exists. It is true that under section 18 the Collector may for good reason exempt an estate or share of an estate from sale, and he would probably refuse to exercise this power, unless the sum in arrear was paid by the defaulter or by some other person. But in the present case it is clear upon the evidence that the Collector refused to exempt the share from sale and to treat the arrear as wiped out or cancelled. In their plaint the plaintiffs say that no order was passed on their application. The same statement was made in their petition of appeal to the Commissioner of the Division. On the 18th September the Collector's order was:—"No bid. Proceedings to be taken under section 14." On the 23rd September Mr. Chardon, a *zurpeshgidar* under one of the plaintiffs, filed an application, asking the Collector to accept the tender or to allow him to pay up the arrear, and in that petition he stated: "Although that arrear with cesses was paid in by *chalans* by the joint proprietors, and an application was made for exemption from sale, still Your Honour upon *returning the application* gave the order: "Let

the *khata* and the *ijmali* be put together and notice under section 14 of the sale law be given to the shareholders of the *khata*, so that they may pay up the arrear and retain the estate." On 1st October the plaintiff Dharu Lall made another application to the Collector, in which, after referring to the deposit and the former application, he stated: "But as the aforesaid share had defaulted seven times within the last three years Your Honour *verbally* passed the order: *There is no need of filing a petition, this share will in any case be sold by auction*," and on that application the Collector made the following order:—"The share was properly put up for sale, as it defaulted seven times in twelve *kists*. It is beside the point that the petitioner or any one else has paid in the arrears after the estate has defaulted. When the *ijmali* share was put up for sale, no one bid, and accordingly I had no alternative but to buy it in for Government (which I did not think advisable) or to postpone the sale and take action under section 14 of the Sale Act. This I did, and having done so, the law must take its course. I have no power to cancel my order. Application rejected."

From all this it is quite clear that the Collector refused to exempt the share from sale; the share was in arrear, and the arrear must be held to have been still due when the Collector proceeded in accordance with the provisions of section 14 of the Act.

It is admitted both by the Subordinate Judge and at the bar here that under section 6 of the Act no payment, or tender of payment, made on September 16th could bar or interfere with the sale unless there had been a specific order of exemption from sale under section 18—*Gobind Chandra Gangapadhya* v. *Sherajunessa Bibi* (1) and *Lala Gauri Shankar Lal* v. *Janki Pershad* (2); but it is contended that in this case there was no such sale as is contemplated by section 6 of the Act, and that the last clause of that section will not apply to a purchase by the other recorded sharers under section 14; that no order of exemption in that case was necessary; and that there being at that time no arrear due, the purchase by the other sharers was illegal and invalid.

(1) 13 C. L. R., 1. (2) I. L. R., 17 Calc., 809.

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL.

I have already given my reasons for holding that the arrear was still due at the time of the purchase by the defendants, and I am of opinion that the tender and deposit of the arrear on September 16th did not invalidate the purchase by the defendants under section 14. The proceedings under section 14 were only taken because there was no bid for the share at the sale of September 18th. Had the share been sold then, it would have been admittedly a good sale, and section 14 distinctly says that a sharer purchasing under that section "shall have the same rights as if the share had been purchased by him at the sale." The defendants therefore, by exercising the privilege allowed them by section 14, were put in the same position as if they had purchased the share at the sale of September 18th, and, as that sale would admittedly have been a good sale in the absence of any order of exemption, the defendants must have acquired a good title by their purchase.

I must confess that I find myself unable to follow the reasoning of the Subordinate Judge or to understand why an arrear, which would have justified a sale of the share on the 18th September, and which presumedly would have justified a sale of the whole estate had the arrear not been paid by the other sharers under section 14, is nevertheless not such an arrear as would make the purchase by the sharers under that section a valid transaction. That purchase must be regarded as a part of the sale proceedings. There had been no bid for the share, and under the law the entire estate was liable to be sold, but as the other sharers were not to blame for the default, the law mercifully allows them to save their property from the hammer by paying up the arrear due from the share in arrear, and the legal effect of such payment is the transfer of the share in arrear to the other sharers *in the same way as if the share had been purchased by them at the sale.*

On the second point I am also of opinion that the lower Court is wrong in holding that the defendants' purchase is invalid, because they did not pay the arrear within ten days from the date of sale, that is to say, September 18th. What section 14 says is that if at the sale the highest offer for the share shall not equal the amount of arrear due thereupon to the date of sale, the Collector shall stop the sale and shall

declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share." Now, in the absence of any specific words to the contrary, the reasonable construction of this provision of the law is that the other sharers shall be allowed ten days' time within which to pay the amount of arrear and save their property from sale, and that the ten days shall count from the date on which notice of the Collector's order or declaration shall have been communicated to them. This reasonable construction of the law is incorporated in a circular order of the Board of Revenue which runs as follows: "When an entire estate, of which separate accounts have been opened, becomes liable to sale for arrears of revenue under this section, in consequence of the highest offer for the share exposed for sale being not equal to the amount of arrears due thereupon up to the date of sale, it shall be the duty of the Collector to publish in open Court a declaration that the entire estate will be put up for sale on a future date, unless the other recorded shareholders, or one or more of them, shall, within ten days from the date of the service of a notice on them, purchase the share in arrear by paying to Government the whole arrear due from such share, and the Collector shall also serve a notice to this effect on each of the other recorded shareholders of the estate. Board's Circular Order, dated 5th October 1884; see Grimley's Revenue Sale Manual, p. 44. It may therefore be presumed that this is the recognised usage in all Collectors' offices, and I think we may and ought to look at this usage as supplementing the law on this point. There is nothing in the law requiring the other sharers to be present at the sale of a share, and it would be altogether unreasonable that an order should be made for the sale of the entire estate without notice to them. It is admitted that notice was issued to the defendants in the present case, and it is not alleged that the arrear was not paid within ten days from the date of service of such notice. That being so, I think there is ample evidence on the record to show that the amount was so paid, and I am of opinion that that payment sufficiently complied with the requirements of the law.

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL.

It has further been contended for the appellants that under section 33 of the Act this point cannot be raised in the present suit inasmuch as it was not taken in the petition of appeal to the Commissioner. Having carefully considered that petition and the order of the Commissioner, I am satisfied that this ground was not "declared and specified" before him, and therefore on the authority of the Judicial Committee of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser* (1) it is not open to the plaintiffs to raise the point in the present suit. It may be that the case is a hard one and that the plaintiffs have suffered great loss in consequence of their default in paying the Government revenue. But that is not a consideration that ought to influence the Civil Courts in the administration of the law. All that the Court has to consider is whether the plaintiffs have succeeded in proving such legal defects in the defendants' title that their purchase ought to be set aside. The law itself in sections 18 and 26 provides for relief in cases of hardship, but that is not a matter in which the Civil Courts are authorized to interfere.

I am of opinion that the appeal should be allowed, and that the plaintiffs' suit should be dismissed with costs in both Courts.

As however my learned colleague dissents from the view of the law taken by me, the papers must be laid before the Chief Justice in order that the case may be referred to a third Judge.

PETHERAM, C.J.—The facts of this case are so fully set out by the learned Judges who have differed that it is not necessary for me to state them again.

Section 3 of the Act provides that, if all arrears of revenue, etc., are not paid up to the date at which they are declared to be due, the estate in arrear shall be sold by auction to the highest bidder. Section 6 provides that "no payment, or tender of payment, made after sunset of the latest day for payment, shall bar or interfere with the sale, either at the time of sale or after its conclusion." Section 10 provides a machinery by which a share of an estate may, for certain purposes, be treated as a separate estate, and section 13 provides that, when this has been done, such share shall be first offered for sale for its own arrears, and that the entire estate shall not be sold for the arrears of shares, unless at

(1) I. L. R., 21 Calc., 70.

the sale a sufficient amount to satisfy the arrears has not been obtained for the share. Section 14 provides for what is to be done with reference to the sale of the entire estate when the share has not been sold because a sufficient amount could not be obtained for it to satisfy its arrears. In that case the Collector must stop the sale, and declare that the entire estate will be put up for sale at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to the Government the whole arrear due from it.

There can be no doubt that whether the sale is a sale of the share only under section 13 or is a sale of the entire estate at a "future time," such as is contemplated by section 14, it must always be a sale for default of payment of revenue under section 3 and be subject to the provision of section 6, and, consequently, no payment or tender can prevent a sale either of the share or of the entire estate unless made in time, or unless the Collector decides to exempt the estate or share from sale under the power given him in section 18, and it is I think impossible to hold that the estate or share is in arrear for the purpose of bringing it to sale and is not in arrear for the purpose of enabling the Collector to act under the other provisions of section 14, which are in fact regulations under which the power to sell the entire estate for the arrears of the share are to be exercised. This disposes of the first ground on which the suit has been decreed, and on that ground I think the appellant is entitled to succeed.

The next ground on which it is contended that this sale cannot be effective to pass the share to other sharers is that the arrear was not paid to the Government by them, until after the period of ten days from the day when the sale of the share was stopped by the Collector. Mr. Justice Ameer Ali thinks that, when that period had expired, all the rights of the other sharers in the entire estate to stop the sale of their own property were at an end, as they are in conflict with those of the defaulting sharer, and he thinks the right of the defaulter must prevail over those of the sharers who are not in default at all. To test the soundness of this view I will try to consider the question from their point of view, and for this purpose will assume that the action is one which is brought by the owners of the shares, not in default, to set aside the sale of the

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL

entire estate for an inadequate price at a sale, held after they had deposited the whole of the arrears, but at a time which was after the period of ten days had expired, but within ten days of the time when they had notice of what had taken place, and that they never in fact had any notice at all of the sale of their own property. If Mr. Justice Ameer Ali's view of the law is correct, their suit must fail, and they must lose their estate, however valuable it may be, for the inadequate price for which it was sold at a sale, of which they never heard, and they must do so because their rights are in conflict with those of their defaulting co-sharer whose right in this view of the law was, at the expiration of an arbitrary period of ten days, to have the whole estate sold in order that he might get the best price for his share. The defaulter might have protected his share by payment at any time before sale of the revenue in arrear, but in addition to this he might have protected it on the very day of sale by himself purchasing it for the amount of the arrears; he must of necessity have known that his share would be offered for sale, because he must have known that he had not paid the revenue in time, and that the Collector had refused to exempt it from sale, and he would know that if a sum equal to the arrears were not offered, the sale would proceed.

I have myself examined the Act and have asked my colleagues and the gentlemen who have appeared in the case whether there is any provision in the Act which prevents the owner of a defaulting estate or share from himself bidding at the sale, and no such provision can be found, and it must follow that if he had been pleased to do so the defaulter might have attended the sale, and himself, as there were no bidders at all, have purchased the share for the amount of the arrears, which amount was already standing to his credit in the Collectorate, and so his estate would have been saved. I cannot think that the Legislature ever intended that the estate not in default should be sacrificed in the interest of a defaulter having such opportunities, and not caring to take advantage of them, without giving its owner some reasonable means of protecting himself, and that I think can only be done under this section, and this is the only section which gives him any protection at all, by reading it as Mr. Justice Beverley

has done, or by limiting the operation of so much of the section as prescribes a period of ten days to the power of the Collector to notify the entire estate for sale, but leaving him at liberty to sell it in the other way prescribed by the section at any time before the sale by public auction takes place, and this is the view which I am disposed to take.

But however that may be, I am of opinion that the ground cannot be relied on by the plaintiff in this action, as it was not declared and specified in his appeal to the Commissioner. Section 33 of the Act provides that "no sale for revenue or other demands, realizable in the same manner as arrears of revenue are realizable, shall be annulled by a Court of Justice, except on the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of," and that "no such sale shall be annulled upon such ground unless the ground shall have been declared and specified in an appeal made to the Commissioner." In this case an appeal was made to the Commissioner, and the grounds of that appeal are upon this record; one of them states that the sale ought to be set aside, because the whole of the arrears had been deposited in the Collectorate on the 16th, but neither of them contains any reference to the period of ten days mentioned in section 14, nor in any way complains that the sale to the defendants was made after that period had expired. There can be no doubt that the object of the suit is to annul the defendants' purchase from the Collector, and if that purchase was made in a sale for arrears of revenue, I think that the Civil Courts cannot annul it on this ground, as it certainly was not declared and specified in the appeal to the Commissioner. It is said that this section only applies to sales by public auction, and that the whole Act shows that this is the case, but I cannot agree in that view of the meaning of the section. The Act provides two modes in which a share of an estate may be sold for an arrear of revenue, one by public auction in the same way as that in which entire estates are sold, the other by private sale to the other sharers in the entire estate, after the share has been offered for sale by public auction, and at a higher price than the highest bid obtained for it. It is quite true that most of the references to sales in the Act appear to be to sales by

1894

GOSSAIN CHUTTURBHOOJ DUT v. ISHRI MUL.

public auction, and the remarks of the Judicial Committee in the case which has been cited before us have the same tendency, but I am quite unable to understand how it can be possible for us to refuse to give effect to such plain words as those used here for such a reason. The words used are "no sale, &c., shall be annulled, &c.," and they are as general as it was possible for the Legislature to make them, and I do not think we should be justified in restraining their operation to sales conducted in one way only, when in their ordinary meaning they include all sales made for this purpose, in any way contemplated by law.

This disposes of the second ground on which the suit has been decreed, and on that ground too I think the appellants are entitled to succeed. I agree with Mr. Justice Beverley that the appeal must be allowed, and the suit dismissed with costs in both Courts. *Appeal allowed.*

J. V. W.

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

1894 *May* 10.

TAQUI JAN, MINOR, BY HIS MOTHER BANU BEGUM (PLAINTIFF) *v.* OBAIDULLA *alias* NANHE NAWAB (DEFENDANT.)*

Minor—Suit on behalf of a person alleged to be but not in fact a minor—Procedure to be adopted when suit is instituted on behalf of an alleged minor who is not so in fact.

When a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the Court should not dismiss the suit, as the defendant can be fully indemnified by the payment of his costs. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

THE facts of this case were as follows: One Mussamut Zaibunissa, sister of the plaintiff, was married to the defendant on the 30th June 1885. She died on the 5th December 1889, and the plaintiff Taqui Jan instituted this suit as a minor through his mother and guardian Mussamut Banu Begum claiming a one-sixth share of the dower of the deceased, on the ground that he,

* Appeal from Original Decree No. 95 of 1893, against the decree of Babu Jogesh Chunder Mitter, Subordinate Judge of Patna, dated the 19th December 1892.

Mussamut Banu Begum, and the defendant, the husband of the deceased, were her only heirs. His case was that the amount of dower fixed on the marriage of the defendant with his sister was one lakh of rupees and one gold mohur. The defendant in his written statement alleged that the plaintiff was not a minor at the time the plaint was filed, and denied that he was an heir of the deceased, who, the defendant stated, had left a son who died on the 9th June 1890. The defendant further denied that the amount of dower as alleged in the plaint was correct, and stated that whatever dower was due to the deceased from the defendant was remitted by her during her lifetime.

The suit was instituted on the 11th April 1891 in the third Subordinate Judge's Court at Patna, and was subsequently transferred to the Court of the second Subordinate Judge. Six issues were framed, one of which related to the questions as to whether the plaintiff was or was not a minor at the time the suit was instituted, and, if not a minor, whether the suit as instituted could be maintained. The other issues related to the question of the plaintiff's heirship, the amount of the dower, and whether the sum had been remitted by Zaibunissa as alleged by the defendant.

Evidence was taken at the hearing upon all the issues, but the Subordinate Judge considered it unnecessary to determine any other than that relating to the plaintiff's minority. He came to the conclusion that the plaintiff was proved to have been of full age at the date of the institution of the suit, and held that the suit could not be maintained and accordingly dismissed it with costs.

The plaintiff appealed.

Babu *Saligram Singh* and Babu *Bhoobun Mohan Biswas* for the appellant.

Moulvi *Mahomed Yusoof* and Moulvi *Mahomed Isfak* for the respondent.

The judgment of the High Court (TREVELYAN and AMEER ALI, JJ.) was as follows :—

This suit was brought on behalf of a person who was alleged to be a minor. The defendant in his written statement contended that the plaintiff was not a minor but in reality had attained his full age. The learned Judge in the Court below tried only the issue as to whether the defendant's plea was true, *viz.*, that the

1894

TAQUI JAN v. OBAIDULLA.

plaintiff was not a minor; and on finding against the plaintiff on that issue dismissed the whole suit. We have not gone into the question whether as a matter of fact the plaintiff was a minor, as having regard to the view which we take as to what course the learned Judge ought to have adopted the learned pleader for the appellant has not contested that finding. We think that the proper penalty for this mistake on the part of the plaintiff, if it was a mistake, ought not to be the loss of the whole suit but the payment of such costs as would properly indemnify the other side. The proper course to be pursued, where the opposite party contends that a plaintiff who is alleged to be a minor is really an adult, is that the defendant apply that the plaint be taken off the file or be amended. If it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

We think it quite clear that the learned Judge having found that the plaintiff was not a minor ought to have given him an opportunity of electing whether he should proceed with the suit himself. No such opportunity was given, and the suit was dismissed. If we were to uphold this decision the result would be, the suit being now barred by limitation, that the plaintiff, because of this error, whether intentional or not, would lose the whole of his cause of action. We therefore set aside the decree of the Court below, and we give the plaintiff leave to amend the plaint and to make such alterations in it as are now necessary in consequence of its now being found that he is a major. We think, however, that it is clear that the defendant is entitled to have all the costs he has incurred up to this date. We accordingly leave untouched the decree of the Court below so far as it orders payment of costs to him, and we also direct that the appellant pay to the respondent his costs in this Court; and as the case has not been heard on the merits but disposed of on a preliminary issue we fix the pleader's fee at five gold mohurs. These sums, *viz.*, the costs in the Court below and in this Court, must be paid within one month from the date on which the record shall arrive in the lower Court, and if so paid the suit will then be tried on its merits. If they be not so paid this appeal will stand dismissed with costs. The record will be sent down at once.

H. T. H. *Appeal allowed and case remanded.*

Before Mr. Justice Beverley and Mr. Justice Gordon.

SITANATH PANDA (PLAINTIFF) *v.* PELARAM TRIPATI AND OTHERS (DEFENDANTS.)*

1894 *June 6.*

Bengal Tenancy Act (VIII of 1885), section 22, clause 2—Transfer of occupancy right and purchase by some of several co-sharer landlords—Merger—Right of other co-sharer landlords to rent.

The acquisition of an occupancy right by a proprietor does not, under sub-section (2) of section 22 of the Bengal Tenancy Act, affect the right of a co-sharer landlord to receive his share of the rent of the tenancy. The "third person" mentioned in that sub-section includes every person interested other than the transferor and transferee.

THE facts of this case are sufficiently stated in the judgment appealed from, which was as follows :—

"The plaintiff as *shebait* having a four annas share in the *debutter mehal* of an idol Kamesvar Jeo, sued the defendants 1 to 4 for arrears of rent for the years 1297 to 1299 in respect of a *jote*, originally held by Kanai Dolui and others, but purchased by defendants 1 to 3 in the name of defendant 4 in execution of a rent decree obtained against them by one of the plaintiff's co-sharers.

"The defendants 1 to 3 who are the plaintiff's co-sharers in the *debutter mehal* deny the alleged purchase, and deny the relationship of landlord and tenant between the plaintiff and themselves. Defendant 4 supports the plaintiff's case.

"The lower Court found the plaintiff's claim proved, and gave him a decree, and against this decree the defendants 1 to 3 appeal.

"It is urged in appeal that there is no evidence that these defendants are in possession of the *jote* as auction-purchasers ; and that, assuming the plaintiff's case to be true, the defendants being proprietors of the *mehal* like the plaintiff, the occupancy *jote*, even if purchased by them, must be supposed to be merged in the superior title, and the plaintiff's claim should have been dismissed.

"With reference to the first point, this Court has no reason to interfere with the lower Court's finding. It is satisfactorily

* Appeal from Appellate Decree No. 1246 of 1893, against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Midnapur, dated the 5th of July 1893, reversing the decree of Babu Apurbakrishna Sen, Munsif of Gurbetta, dated the 6th of September 1892.

1894

SITANATH PANDA v. PELARAM TRIPATI.

proved by the other co-sharers of the *mehal*, one of whom, Gobind Prosad, is a common relation of both plaintiff and defendants, that defendants 1 to 3 did purchase the *jote* at a sale for arrears of rent, and are in possession of it, and that defendant 4, a creature of those defendants, is their *benamidar*—a fact admitted by defendant 4 himself.

"As regards the second point, this Court observes that defendants 1 to 3 being proved to be in possession of the *jote* as ryots, the said *jote* must be presumed, in the absence of anything to the contrary, and as between the plaintiff and themselves, to be their occupancy holding under section 20, sub-section (7) of the Bengal Tenancy Act. Then, again, the defendants 1 to 3 being admittedly joint proprietors of the *mehal* with the plaintiff, the occupancy *jote* purchased by them must be supposed to have merged in their superior rights as proprietors under section 22, sub-section (2) of the Tenancy Act, and no rents can be claimed by the plaintiffs from them on account of it.

"The appeal is decreed, and the plaintiff's suit is dismissed; but each party will bear his costs of both Courts under the circumstances of the case."

The plaintiff appealed from this decision, mainly on the grounds that the Court had misapprehended the meaning of section 22, sub-section (2), of the Bengal Tenancy Act, and that as between the plaintiff and defendants 1 to 3 the Court should have held that, though there was a merger, that did not affect the plaintiff's right to realize rent from the defendants.

Babu *Boidonath Dutt* for the appellant.

Babu *Nogendro Nath Mitter* for the respondents.

The judgment of the Court (BEVERLEY and GORDON, JJ.) was as follows:—

In this case the plaintiff sued for a four-anna share of the rent of a certain *jote* on the allegation that the *jote* in question had been purchased by the defendants 1 to 3 in the name of defendant No. 4. The defendants 1 to 3, who are co-sharers in the *mouza* with the plaintiff, deny the purchase of the *jote*. The defendant No. 4 in his written statement alleged that the defendants 2 and 3 had purchased the *jote*, *benami*, in his name, and that defendants 2 and 3 were in possession.

The first Court found that the defendants 1 and 2 had purchased the *jote* in the name of defendant No. 4, and were in possession of the *jote*, and decreed the suit against the defendants 1 to 4. This decree was reversed by the Subordinate Judge on the ground that under section 20, sub-section (7), of the Bengal Tenancy Act, the defendants must be presumed to be ryots with a right of occupancy, and therefore under section 22, sub-section (2), the right had merged in their superior right as proprietors, and that no rent could be claimed by the plaintiff therefor, and he accordingly allowed the appeal and dismissed the plaintiff's suit.

It is contended in second appeal that the lower Appellate Court is wrong in law in its interpretation of sections 20 and 22 of the Bengal Tenancy Act, and in reply to that the respondent has endeavoured to support the decree of the lower Appellate Court by showing that there is no legal evidence of the purchase of the *jote* by the defendants and of their possession in pursuance of it.

We think it is impossible to say that there is absolutely no evidence of the purchase, although in our opinion that evidence is extremely slight, and had we to decide the point upon the evidence, we might have come to a different conclusion, but there being some sort of evidence, the lower Courts were justified in finding as a fact that the defendants had purchased the *jote*, and we cannot interfere with that finding of fact.

Then as regards the other point raised by the appellant, it appears to us that, whether or not the *jote* was an occupancy holding, section 22, sub-section (2) of the Bengal Tenancy Act does not operate to prevent the landlord from recovering the rent of the holding. Sub-section (2) runs as follows: "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person." That is to say, the occupancy right will cease to exist, but it does not follow that the tenancy will be altogether extinguished. The third person mentioned in the clause must be held to include every person interested other than the transferor and transferee. So that the acquisition of an occupancy right by a proprietor would not affect the right of a co-sharer landlord to receive his share of the rent of the tenancy.

1894

SITANATH PANDA v. PELARAM TRIPATI.

That being so, the decree of the lower Appellate Court must be reversed, and that of the first Court restored with costs in both the Appellate Courts. The finding of the Appellate Court being that the defendants 1 to 3 purchased the *jote* the decree will be against them, and the suit will be dismissed as against defendant No. 4.

Appeal allowed.

J. V. W.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894 *June* 26.

SHAM CHARAN MAL (PLAINTIFF) *v.* CHOWDHRY DEBYA SINGH PAHRAJ, MINOR, BY HIS GUARDIAN CHOWDHRY SHAM SUNDER ROY (DEFENDANT).*

Minor—Necessaries—Bond, registered, executed by minor—Registration of bond by minor—Limitation to suit against a minor on a registered bond executed by him for necessaries—Contract Act (IX of 1872), section 68—Registration Act (III of 1877), section 35.

On the 20th April 1886 a sum of money was advanced by *A.* to a minor who executed a bond in respect thereof and duly registered the same. The money was required by the minor to provide for his defence in certain criminal proceedings then pending against him on a charge of dacoity and was used by him for that purpose. On the 18th June 1892, *A.* instituted a suit against the minor for the amount due on the bond. It was urged on behalf of the minor, who had not attained majority at the time the suit was filed, that he was not liable to *A.* for the amount advanced; that it was not advanced for "necessaries;" that he was not liable under the bond, and that the fact of it being registered could not help the plaintiff, and consequently, even assuming that the money was required for "necessaries," the suit was barred by limitation being brought more than three years after the advance was made.

Held, that the liberty of the minor being at stake, the money advanced must be taken to have been borrowed for necessaries within the meaning of section 68 of the Contract Act.

Held, further, that there being nothing to show that the minor *appeared* to be such to the Registrar at the time of registration so as to enable the Registrar to refuse registration under section 35 of the Registration Act, and the concealment of the fact of the executant's minority both by himself and by the plaintiff from the Registrar not amounting to fraud so as

* Appeal from Appellate Decree No. 757 of 1893, against the decree of B. L. Gupta, Esq., District Judge of Cuttack, dated the 1st of February 1893, reversing the decree of Babu Bolloram Mullick, Subordinate Judge of that district, dated the 22nd of August 1892.

to invalidate the registration proceedings as against the minor, the Registrar had in no way violated the law relating to the registration of documents, and the bond must be taken to have been duly registered.

Held, also, that in such a case the bond could not be ignored and treated as non-existent, being the basis of the suit, and that on its being proved to have been executed by the minor in respect of money advanced for necessaries, effect must be given to the fact of registration and the suit was not barred by limitation, and that the plaintiff was entitled to a decree.

THE plaintiff instituted this suit on the 18th June 1892 to recover from the defendants Rs. 2,478 alleged to be due on a registered bond dated the 20th April 1886. He alleged that the defendants were being prosecuted for dacoity and that the money was borrowed for the purpose of their defence. Chowdry Debya Singh Pahraj, who was sued as a minor, was, the plaintiff admitted, a minor at the time he executed the bond, but it was alleged that his mother and certificated guardian, who had since died, had admitted the amount to be justly due from the minor under the bond, and that the money had been borrowed for the benefit of the minor and for necessaries.

This suit was only contested on behalf of the minor and one other of the defendants. The latter pleaded that the money was borrowed for the minor, and contended that he was not liable, though he admitted the execution of the bond. The Subordinate Judge held that he was liable and no appeal was preferred against that decision.

On behalf of the minor it was contended that he could not be liable under the bond; that the whole amount of the money borrowed was not required for the purpose of the defence and that the suit was barred by limitation.

The execution of the bond by the minor was admitted at the hearing, and the Subordinate Judge found that there was ample evidence to show that the money advanced on the bond was paid before the Registrar and advanced to the infant for the purpose of his defence in the criminal proceedings; that the money was not taken by the infant's guardian, and that there was no evidence to show that the plaintiff was aware of the guardianship at the time the advance was made. He further held that money was undoubtedly used for the purpose of the defence, and that it was quite unnecessary for the

1894

SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ.

plaintiff to prove that the whole of the amount advanced was so used. It was urged before the Subordinate Judge that a contract made by a minor was *void* under the Contract Act and not merely *voidable*, and he was referred to Addison on Contracts, pp. 15, 1024 and 1028; Story on Contracts, pp. 131-138; Pollock on Contracts, pp. 32-34; *Bykuntnath Roy Chowdhry* v. *Pogose* (1) and *Watkins* v. *Dhunnoo Baboo* (2); but the Subordinate Judge held that such contracts were not void under the Act, and quoted *Mahamed Arif* v. *Saraswati Debya* (3) as an authority for that proposition, and came to the conclusion that the contract was binding on the minor under section 68 of the Contract Act, the advance having been made for necessaries.

On the question of limitation the material portion of the Subordinate Judge's judgment was as follows:—

"It appears that the plaint was filed after the expiration of three years but within six years from the date when the loan was payable. The bond apparently is a contract in writing registered within the meaning of Article 116, Schedule II of the Limitation Act, which prescribes six years as the period within which a suit based on it is to be instituted. It is contended, however, on behalf of the defendant No. 1 that as he was a minor when the bond was registered the registration was null and void, and therefore the bond was not a registered document to which Article 116 would apply. To determine the legal sufficiency of the contention it is necessary to examine the law and authorities in detail. I should premise at the outset that Article 116 does not turn upon the validity or otherwise of the registration of the contract therein referred to. It speaks of a contract which professes to have been registered, and the bond is on the face of it a registered contract. Regard being had therefore to the frame of the article, the question now raised would not be an open one for the purpose of deciding the plea of limitation.

"Turning to the Registration Act I find there is nothing to support the defendant's position. Under section 35 of that Act the registering officer 'shall refuse to register the document if the executant thereof appears to be a minor.' The necessary corollary from the above would be that if the executant does not appear to be a minor the registering officer shall register the document. Now there are no materials before me to show how defendant No. 1 *appeared* to the Sub-Registrar at the time of the registration of the document, and it is an open question if a Civil Court can exercise revisional jurisdiction over the Sub-Registrar's proceedings in the matter of that appearance for testing the validity of the registration of an instrument. No such jurisdiction is conferred on the Civil Cour

(1) 5 W. R., 2. (2) I. L. R., 7 Calc., 140.
(3) I. L. R., 18 Calc., 259.

by the Act. The Act nowhere provides for an appeal against an order or proceeding admitting an instrument to registration. It is in case of refusal to register that an appeal or civil suit is prescribed as a remedial measure. Further, the Act does not lay down any procedure as to how the question of minority may be disposed of under section 35. No *quasi-judicial* enquiry is prescribed, and therefore it cannot be said that in the present case the Sub-Registrar has acted in excess of his legitimate jurisdiction. That being so it is impossible to predicate of his proceeding as being illegal or irregular. This is a case where the registration certificate should carry with it its special finality, and it is not for the Civil Court to question it: *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu* (1), *Husaini Begam* v. *Mulo* (2). That certificate merely publishes the registered document to the world leaving its factum and validity open to contest at the instance of a party interested therein. The cases quoted on defendant's side do not establish the position contended for. In *Beni Madhab Mitter* v. *Khatir Mondul* (3) and *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (4) the question hinged on the Sub-Registrar's territorial jurisdiction which does not arise in this case. *Muhammad Ewaz* v. *Birj Lal* (5) is wholly distinguishable. There out of three persons whose names appeared on the document as executants two admitted execution before the Sub-Registrar and the Judicial Committee held that against the absentee registration of the document was bad.

"In *Husaini Begam* v. *Mulo* (2) there was no admission of execution of the bond on behalf of the minor, and the case was decided in accordance with the principles laid down by the Judicial Committee above mentioned.

"In connection with this point the plea of fraud is raised. It is urged that as plaintiff caused the registration of the bond by representing that defendant No. 1 was an adult, when plaintiff knew the defendant was not so, it was a fraudulent representation, and therefore the registration was void. Now it is true that plaintiff was aware of the executant's minority at the date of registration, but there is nothing to show that he was present before the registering officer at the time and made any representation at all. He might have suffered defendant No. 1 to pass as an adult, and if there was passive fraud on plaintiff's part, defendant No. 1 chose to play an actively fraudulent part. There was certainly a league between them to defraud the Sub-Registrar, but it cannot be contended that thereby plaintiff has committed a fraud on defendant No. 1. The learned Vakil for the defence referred me to the definition of fraud in section 17 of the Contract Act. That definition abundantly shows that it is no fraud unless committed by a "party" to deceive "another party," and the Sub-Registrar was certainly not a "party" within the meaning of the definition. I would accordingly hold that the suit is not barred by limitation."

(1) I. L. R., 6 Calc., 25.
(2) I. L. R., 5 All., 84.
(3) I. L. R., 14 Calc., 449.
(4) I. L. R., 18 Calc., 556.
(5) I. L. R., 1 All., 465.

1894

SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ.

The Subordinate Judge accordingly gave the plaintiff a decree for the amount due on the bond against all the defendants.

Defendant No. 1, the minor, appealed to the District Judge who reversed the decision of the lower Court as against the appellant. The material portion of his judgment was as follows :—

"The first question that arises in this case refers to the liability of the minor and the extent of that liability. Under sections 10 and 11 of the Contract Act, a minor is incompetent to enter into any contract, and his liability could arise only under circumstances covered by section 68 of that Act. But it has been held more than once by the Calcutta High Court that Act IX of 1872 effected no change in the law of contracts as regards minors whose liabilities must continue to be governed by the English law on the subject. It is enough to refer to the recently reported case of *Mahamed Arif* v. *Saraswati Debya* (1). The contract thus being not void but voidable, the appellant says: 'I repudiate the contract and wish to avoid it.' To this the plaintiff replies that the money was lent for a necessary purpose, and although irrespective of the bond the appellant would be liable to repay it by the common law and also under section 68 of the Contract Act, he cannot resist this suit and evade payment merely because he also executed a bond. This argument is valid, and it has been so held by the Court of Queen's Bench in *Walter* v. *Everard* (2). The lower Court has found, and that finding has not been attacked in appeal, that the loan was taken for a necessary purpose, *viz.*, to pay the expenses of a criminal case in which all the four defendants were accused persons and in which three of them, including the minor, were committed to the Sessions on charges of dacoity, etc., of which they were acquitted. I hold that there was legal necessity.

"If, therefore, the deed was a single bond executed by the minor alone for necessaries, the case would present no difficulties. But the bond in this case is a joint one, and is a registered document. Hence questions relating to joint liability and limitation arise, the latter pending on the validity of the registration.

"In the case of *Walter* v. *Everard* cited above, Lord Esher said in his judgment: 'It comes in the result to this—that a bond given by an infant for the price of necessaries does not prevent the obligee from recovering that price from him, if the bond is a single one, and it is not relied on simply as a bond. In the same way an infant can be sued upon a covenant by deed for the price of necessaries, but the case must be treated just as if there had been no deed. The Court must enquire whether the things in question were in fact supplied to the infant, and whether, according to the ordinary rule, that which was supplied was necessary. The Court must do exactly what it would do if there were no deed and what it certainly would not do in the case of an ordinary deed not given by an infant.'

(1) I. L. R., 18 Calc., 259. (2) L. R., [1891] 2 Q. B., 369.

"Now, if, in accordance with the principle so clearly and forcibly laid down above, we deal with the present case 'as if there had been no deed' the suit must be held to have been barred by the three years' rule of limitation as against the minor under Articles 66 and 57 of the Schedule to the Limitation Act. Also if we deal with the case as if there was no bond, it is extremely doubtful if the minor can be cast in joint liability with the other defendants. In Addison on Contracts (6th edition, page 1,055) it is stated: 'If one of several joint contractors was an infant at the time of making the contract, and has not, since the attainment of his majority and before commencement of the action, ratified the contract, he ought not to be made a defendant with his co-contractors.' Authorities are cited in support of this proposition, but I am unable to say if in any of the cases cited the contract was for necessaries. It is urged emphatically on behalf of the appellant that if he be held liable only for the supply of necessaries, his liability should in equity be limited by the extent of his necessity; and that the plaintiff not having given any evidence of the extent of the necessity, his suit as against the minor should be dismissed, or at the best the minor should be charged only with a fourth part of the total amount claimed.

"I am disposed to hold that, if a suit against the minor jointly with the other defendants would lie in this case, the decree should also be joint, and I am, therefore, not prepared on this ground to disturb the judgment of the lower Court.

"Upon the question of limitation, however, I feel myself compelled to differ from the view taken by the learned Subordinate Judge. In my opinion, the plaintiff in this case is not entitled, as against the minor, to the extended period of six years allowed to holders of registered bonds under Article 116 of the Limitation Act as interpreted in *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (1).

"It is after a careful consideration of the authorities, though not without some hesitation, that I have arrived at this conclusion, and I have done so on two grounds: Firstly, because the bond could not be enforced against the minor, except on the ground of necessaries, and the learned Judges of the Queen's Bench have held not that the bond is valid as a bond, but that 'it did not prevent the minor from being liable for the amount claimed' in the same manner 'as if there had been no deed.' 'The Court must do exactly what it would do if there were no deed.' In other words, the Court must dismiss the suit as barred by limitation against the minor.

"My second ground is that the registration of the bond was no registration as against the minor within the meaning of the definition of the word 'registered' given in section 3 of the Limitation Act.

"Section 35 of the Registration Act (III of 1877) directs that where any of the executants to a deed appear to the registering officer to be a minor registration in regard to the minor should be refused. In the present case

(1) I. L. R., 6 Calc., 94.

1894

SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ.

the lower Court has held, and I also hold, that both parties were aware of the minority of the appellant. The Subordinate Judge has found that 'there was certainly a league between them to defraud the Sub-Registrar, but it cannot be contended that thereby plaintiff has committed an act of fraud on defendant No. 1.' No; but it seems to me equally certain that a document, the registration of which was obtained by fraud practised on the registering officer, cannot be considered to have been 'duly registered' under the provisions of the Registration Act, or within the meaning of the Limitation Act. But apart from fraud, I consider that registration of a document executed admittedly by a minor is no registration as against him, for a minor is incompetent to admit execution before the registering officer, and that officer has no jurisdiction to record a minor's admission. This is not a case where a minor, by falsely representing himself to be of age, induces another person to enter into a contract with him. For in that case, even by the common law of England, the minor would be estopped from pleading minority afterwards. In the Full Bench case of *Baij Nath Tewari* v. *Sheo Sahoy Bhagut* (1) even an imperfect compliance with the provisions of section 21 of the Registration Act was held to invalidate the registration. Much more so ought to be, I think, the case where one of the parties admitting execution was admittedly a minor at the time. It is unnecessary for me to discuss the other authorities cited on this point, because none of them bear on the question of minority, or other similar disability. I hold that no legal incidents can attach to registration by a minor, and that the Civil Court should not give effect to such registration.

"For these reasons I hold that the suit as against the minor appellant was time-barred."

The District Judge accordingly dismissed the suit as against the minor defendant, and against that decision the plaintiff now appealed to the High Court.

Mr. *W. C. Bonnerjee* and Babu *Umakali Mukerjee* for the appellant.

Babu *Nil Madhub Bose* and Babu *Monmohan Dutt* for the respondent.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

This was a suit to recover a certain sum of money on a registered bond, dated the 20th April 1886, executed by the four defendants in favour of the plaintiff. At the time of the execution of the bond and of the institution of the suit, the defendant No. 1 was a minor, and the plaintiff's case against him was that he borrowed the money covered by the bond for

(1) I. L. R., 18 Calc., 556.

necessaries, that is to say, for the purpose of defraying expenses incurred in defending him in a prosecution for dacoity before the Criminal Courts. This defendant, through his guardian *ad litem*, denied his liability under the bond, and he also pleaded limitation. The Subordinate Judge decreed the claim against all the defendants. He found that the minor defendant borrowed the money for necessaries, as alleged by the plaintiff, and relying on section 68 of the Contract Act, and on certain authorities cited in his judgment, he held that the bond was good and valid as against the minor. On the question of limitation the Subordinate Judge was of opinion that, notwithstanding the fact that defendant No. 1 was a minor when he admitted execution before the registering officer, the bond was duly registered under the Registration Act, and that, therefore, under Article 116, Schedule II of the Limitation Act, the suit having been brought less than six (though more than three) years after the due date was within time. And as regards the plea of fraud in the registering officer, which appears to have been raised before him at the trial, the Subordinate Judge held that, although there was certainly a league between the plaintiff and the minor defendant to defraud the Sub-Registrar, still "it cannot be contended that thereby the plaintiff has committed an act of fraud on defendant No. 1. The learned vakil for the defence referred me to the definition of fraud in section 17 of the Contract Act. That definition abundantly shows that it is no fraud unless committed by a party, and the Sub-Registrar was certainly not a party within the meaning of the definition." On appeal by the minor defendant the District Judge has reversed the decree of the Subordinate Judge and dismissed the suit as against him. He agrees with the Subordinate Judge that the minor defendant borrowed the money on the bond for necessaries, and he holds therefore on the authority of the case *Walter* v. *Everard* (1) that he is liable. But as regards limitation he finds that the suit is barred. Relying upon certain passages in the judgment of Lord Esher in the case *Walter* v. *Everard* the learned District Judge is of opinion that the present suit should be dealt with as if there were no bond at all, and that therefore the suit, having been instituted more than three years after the

(1) L. R. [1891] 2 Q. B., 369.

1894.

SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ.

due date of payment, is barred. And on the question of registration of the bond the learned Judge observes: "Registration of a document executed admittedly by a minor is no registration as against him, for a minor is incompetent to admit execution before the registering officer, and that officer has no jurisdiction to record a minor's admission." Against this decision the plaintiff has appealed to this Court and his learned Counsel has contended before us that the District Judge has taken an erroneous view of the questions of limitation and registration, while the learned vakil for the respondent has argued in support of the judgment of the District Judge on the ground decided against him, that the contract was not for necessaries within the proper meaning of the term, and that therefore it is not binding on the minor. We think, however, that this latter contention is not correct. The liberty of the minor was in jeopardy. There was a charge of dacoity impending over him in the Criminal Courts, and in order to defend him and to save him from punishment and incarceration in jail it was necessary to raise funds for legal advice and assistance. Pleaders were employed to defend him, and the money borrowed under the bond was paid to them as remuneration. In these circumstances, we think it may fairly and reasonably be said that the money was borrowed for necessaries within the meaning of section 68 of the Contract Act, and that the minor is accordingly liable on the contract. As an authority for the view we take we may refer to the decision of Mr. Justice Broughton in *Watkins* v. *Dhunnoo Baboo* (1) in which that learned Judge held that a minor is liable for costs incurred in successfully defending a suit in which his property was in jeopardy, and that such costs are recoverable from him as if they were necessaries. Whether the principle which underlies that decision can be supported in its entirety, it is not necessary to discuss in this case. It is sufficient to say that the liberty of the minor being at stake, we think the money should be taken to have been borrowed for necessaries.

Then as to the plaintiff's appeal we think it must succeed. We think the learned District Judge is in error in holding that the present suit should be treated as if there were

(1) I. L. R., 7 Calc., 140.

no bond at all, and that it is accordingly barred, and further that on this point he has not rightly construed the judgment of Lord Esher in the case of *Walter* v. *Everard*, to which we have already referred. That suit was brought on a covenant under seal, in which a consideration is implied, and Lord Esher in his judgment says: "It is not true that you can sue an infant upon a bond given by him for the price of necessaries supplied to him, with all the ordinary incidents of such an action. The plaintiff cannot simply put in the bond against the infant, and say that bond is under your seal, and there can be no inquiry into the consideration given for it." And further on in his judgment the same learned Judge observes: "You cannot sue the infant upon his bond as a bond. But if the bond is what is called a single bond, that is, if it is given only for the reasonable price of necessaries supplied to the infant, and there is no penalty, the infant can be sued upon it." We think that the principle thus enunciated when applied to the present case means this—that before the minor defendant could be fixed with liability, it was necessary for the plaintiff to prove not only the execution of the bond by him, but also that he borrowed the money covered by it for necessaries; in other words, it was incumbent on the plaintiff to establish this fact as if there were no bond at all, and in this sense we think the suit must be treated as Lord Esher observes: "Just as if there had been no deed." The bond cannot be ignored and treated as non-existent, because it is the basis of the suit, and it has been proved to have been executed by the defendant. On the question of registration also we are unable to agree with the District Judge. The point for determination is whether the bond has been duly registered in accordance with the provisions of the Registration Act, and we are of opinion that it has. Section 35 of the Act provides: "If any such person (by whom the document purports to be executed) appears to the registering officer to be a minor * * * the registering officer shall refuse to register the document as to the person so appearing." In the present case the defendant No. 1 appeared before the Registrar and admitted execution of the bond, and the document was accordingly registered. We may well assume that before the registering officer registered

1894

SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ.

it, he was satisfied in his own mind (at any rate it did not appear to him to be otherwise) that the defendant No. 1 was not a minor, and by so registering, we are unable to say that he has in any way violated the law relating to the registration of documents. That law nowhere lays down that registration of a document, execution of which is admitted by a minor, is *ipso facto* void as against such minor, or void for want of jurisdiction on the part of the registering officer. No doubt deception appears to have been practised on the registering officer by the plaintiff and the minor by concealing from him the fact of the minority of the latter, but that, in our opinion, does not amount to fraud in the proper sense of the term, so as to invalidate the registration proceedings as against the minor defendant. In this view we think that the suit is not barred, it having been instituted within six years from the due date of the bond.

We accordingly decree the appeal, and restore the decree of the Subordinate Judge with costs.

H. T. H. *Appeal decreed.*

PRIVY COUNCIL.

P. C.*
1894
April 19 & 20.
June 9.

KADER MOIDEEN (PLAINTIFF) *v.* C. W. NEPEAN AND OTHERS (DEFENDANTS.)

[On appeal from the Court of the Judicial Commissioner of Lower Burma.]

Mortgage—Form of Mortgage—Sale—Construction whether lands had been sold or mortgaged—Evidence—Documents explained by parol—Waste land grants—Usufructuary mortgage.

Waste lands, granted in 1870, were transferred by the grantee in 1871 to his creditor, since deceased, from whose representatives in 1891 he claimed redemption, alleging that the transfer had been made upon a mortgage with possession. The grantee had previously, in 1870, mortgaged the lands to this creditor to secure advances taken for part payment of the purchase-money. In 1871 they arranged that the creditor should advance the entire balance, and they jointly petitioned for an entry to be made, in the register of waste land grants, that the ownership had been transferred from the one to the other of them. This entry was made, and endorsements to the same effect were made on the documents of grant.

* *Present:* LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR R. COUCH.

On the question whether the transaction was a mortgage, or a sale as the defendants alleged it to be, general evidence was given, in addition to the documentary; and among the facts in favour of the plaintiff was that the creditor had retained uncancelled, till his death, all acknowledgments for the money advanced by him in the transaction. Although, under other circumstances, and on the documents alone, the inference might have been that there had been a sale for some undisclosed consideration, yet, on the true construction of the joint petition, and the orders made thereon, the proper conclusion was that the entry and the endorsements were intended only as a record of the arrangement proposed by the parties, and sanctioned by the registering officer. The intention was not to have an absolute sale. The transaction was *held* to be a mortgage which the plaintiff was entitled to redeem.

APPEAL from a decree (28th September 1892) of the Judicial Commissioner of Lower Burma, affirming a decree (18th July 1892) of the Commissioner of the Tenasserim division, who reversed a decree (16th May 1892) of the District Judge of Shwegyin.

This suit was brought on the 4th December 1891 by the appellant, Kader Moideen, a contractor of Toungoo, against C. W. Nepean and three others, now the respondents, who represented John Nepean, deceased in 1883. The plaintiff claimed redemption upon accounts to be taken of three allotments of land in the Shwegyin district, comprising 4,524 acres, granted to him by the Government under the waste land rules in 1870, and alleged by him to have been mortgaged to John Nepean in 1871.

The plaint stated that, after acquiring the three allotments, the plaintiff, on the 6th June 1870, mortgaged them to John Nepean to secure advances made by the latter for payment of the instalments due to the Government for the purchase-money; and that afterwards, in 1871, in order to complete payment, he agreed that John Nepean, who without further security would lend no more, should have possession of the lands allotted, the mortgage continuing, and should appropriate the profits towards payment of the principal and interest on arrears then due, till the whole amount should have been recovered by the mortgagee; and that, to carry out this arrangement, a transfer should be entered in the register of waste land grants to John Nepean: that on the 3rd June 1871 this entry was duly effected, the mortgage of 6th June 1870 remaining with John Nepean, who paid on account of

1894

KADER MOIDEEN v. NEPEAN.

the plaintiff the principal, Rs. 7,158, and interest Rs. 639 : that the rents and profits of the land had paid these sums off, and had left a balance of about Rs. 3,000, due by the defendants, the present holders of the land, to the plaintiff, who had demanded, and had been refused, an account.

The first and second defendants, by their written statement, admitted the mortgage of 6th June 1870, and added : "About two days before the lands would have been forfeited for default in payment of the purchase-money and interest thereon, the plaintiff requested John Nepean, who, with the concurrence of the Revenue officer, agreed to the request, to accept an absolute and unconditional transfer to him of the interest of the plaintiff in the lands, and in consideration thereof to cancel the mortgage of 1870, to release the plaintiff from his covenant to repay the Rs. 3,000 and interest secured thereby, and other debts, and to pay and indemnify the plaintiff from all liability for the balance of the purchase money and the interest due thereon. This transfer was carried into effect by the Revenue officer ; the unconditional transfer of the lands to John Nepean was registered according to the rules ; and he was put into possession of the lands by order. This was effected on the 3rd July 1871, and the mortgage deed, as a document of title being in the mortgagee's hands with the other documents of title, remained with him as the owner ; but the defendants deny that it so remained with him as evidence of the transaction alleged by the plaintiff."

The Revenue officer was the Deputy Commissioner. The words entered in the register, and endorsed on the grants, and all the facts of the case, are stated in their Lordships' judgment.

The principal issue was the following : "Was the transfer of Kader Moideen's land to John Nepean on the 3rd June 1871, which was registered and accompanied by possession, an absolute transfer, or was it a mortgage ?"

The District Judge, to decide this, considered whether he must confine himself to the entry in the waste lands register, and the three grants only, or whether he was at liberty to look at all the surrounding circumstances, the mortgage of 1870, the joint peti-

tion, and other documents, and the conduct of the parties. He proceeded upon evidence given of all the above. He found that the transfer of 3rd June 1871 was not a transfer by way of sale, but that there was a contract between the parties, which was a usufructuary mortgage; and he decided that the plaintiff had a right of redemption, limited only by article 148 of the second schedule of the Limitation Act, 1877, fixing sixty years as the limit of time. His decree directed that accounts be taken of all the rents and profits received by the defendants, or their predecessor in title, since the 3rd June 1871, of all debts due to them from the plaintiff, of all money expended by them in paying Government dues on these lands, and in managing and improving them, and of the value of all improvements.

On an appeal by the defendants this decision was reversed. The Commissioner was of opinion that oral evidence to alter, vary, or control the written evidence was inadmissible. The written evidence was contained in the joint petition, in the endorsements on the deeds of grant, and in the entries in the register. If this was all the admissible evidence, and he was of opinion that it was all that was legally before the Court, there could, he added, be no reasonable doubt that the transaction was a sale. The application was for a substitution of names; the entry in the register and the endorsements on the documents of grant described what was transferred as "ownership." and John Nepean was described as the "new holder." This judgment was affirmed by the Judicial Commissioner, who was also of opinion that the oral evidence taken by the District Judge was inadmissible.

It was true, he considered, that all the terms of the contract had not been reduced to writing; and, had section 91 of the Indian Evidence Act, 1872, dealt only with contracts, it might have been open to the appellant to prove that there were other terms and what those were, but that section dealt also with "grants and other dispositions of property;" and as, in his opinion, the endorsements on the original grants were clear grants or dispositions of property, so it followed that parol evidence was not admissible to affect them. With regard to the entry made on the 3rd June 1871 in the register, his judgment was that, if the conduct of the parties had shown that it was their intention to

1894

KADER MOIDEEN v. NEPEAN.

treat the transaction as a mortgage and not as a sale, oral evidence of the terms of the mortgage would not be excluded. But it was clear to the Court that whatever the appellant's view might have been when he signed the endorsements on the grants, Nepean knew their effect perfectly well, and never for a moment intended to occupy the position of a mortgagee. The plaintiff's appeal was dismissed, and the decree of the Commissioner dismissing the suit was affirmed.

On this appeal,—

The *Solicitor General* (Sir *John Rigby*, *Q. C.*) Mr. *J. H. A. Branson*, and Mr. *G. J. Turner*, for the appellant, argued that the Appellate Courts were wrong in holding that oral evidence was inadmissible to show that the transaction in question was a mortgage and not a sale. The grounds on which they had reversed the finding of the first Court, which was that, on the facts, the contract of mortgage had been entered into, were insufficient. The decision of the first Court should have been upheld. It was a fact that could not be disputed that the entry in the register, and the endorsements on the grants of the allotted lands, did not contain all the terms of the agreement. Those terms had to be ascertained. That being the case, the decision of the Judicial Commissioner, who referred to sections 91 and 92 of the Indian Evidence Act, excluding oral evidence of any agreement, or statement, for the purpose of adding to the written terms, was the result of a misapprehension. Any fact might be proved which showed in what manner the language of a document was related to existing facts—a proviso upon section 92. On the other hand, the evidence had been rightly received by the Court of first instance, and rightly understood. That Court had arrived at the actual state of things. Both the Appellate Courts had erred as to the reception of evidence, and the Judicial Commissioner had been wrong in holding that the entry in the register and the endorsements on the documents constituted an absolute conveyance in proprietary right to John Nepean. The word "ownership" did not import absolute ownership, but represented a right of property consistent with the arrangement between the parties to the transfer. The evidence showed that the transfer

effected was nothing more than a further development of the prior mortgage, by giving a usufructuary possession. There was no sale outright ; but the mortgage was altered into one of a possessary character for the protection of the mortgagee, when he should have made further advances, and to enable him to re-pay himself. As to usufructuary mortgages reference was made to *Thumbaswamy Mudelly* v. *Hossain Rowthen* (1).

Mr. *Cozens Hardy, Q. C.*, Mr. *James Fox*, and Mr. *J. A. D. Heaton*, for the respondents, contended that the burden of proof, which was distinctly upon the appellant to show that the transaction was a mortgage and not (as *primâ facie* it appeared to be) an absolute transfer by way of a sale, had not been discharged by the appellant. The evidence, which the respondents did not so much insist upon excluding as in taking for what it was worth, was in result in favour of the defence, upon the balance of statements conflicting with documents, and in regard to the difficulty of trusting the oral testimony. The conclusions of the two Appellate Courts were right, whether or not some of their reasoning was open to argument. The contention for the respondents mainly was that the evidence of the alleged arrangement, to have a usufructuary mortgage, had not displaced the documentary proof of there having been, in July 1871, a formal and absolute transfer of ownership. The positions taken up must be considered in their order of time ; that the appellant had afterwards impugned the transfer considered by the Revenue officer to have been unqualified went no great way ; and conversations alleged to have taken place twenty years before were insufficient to outweigh documents of title. Several orders passed by the Deputy Commissioner in 1871, while the facts were prominently before him, showed that he then refused to consider the transaction as anything but an actual transfer of the proprietary right. Kader Moideen's applications, after the transfer had been effected, were met by a refusal on the part of the officer cognizant of the entire transaction to recognize any right of his to have the sale cancelled, and Kader Moideen, during an interval of many years, ceased to insist on his supposed right.

The *Solicitor General* replied.

(1) I. L. R., 1 Mad., 1 ; L. R., 2 I. A., 241.

1894

KADER MOIDEEN v. NEPEAN.

Their Lordships' judgment was, afterwards, on the 9th June 1894, delivered by

LORD MACNAGHTEN.—The appellant Kader Moideen seeks to redeem certain lands situated in the district of Shwegyin in Lower Burma which the respondents, deriving title from one John Nepean who died in 1883, claim to hold free from any right or equity of redemption.

The lands in question were originally waste lands, the property of the Government. In 1866 and 1867 they were sold to Kader Moideen in three lots under the rules then in force for the sale of waste lands in British Burma. On payment of preliminary expenses, and a fraction of the purchase money as required by the rules, each of the three lots was conveyed to Kader Moideen "in full proprietary right," subject to conditions intended to protect the interest of the Government as an unpaid vendor. In 1871, at the joint request of Kader Moideen and John Nepean, the property was transferred into Nepean's name in the Government books, and thenceforth he was recognized as owner and acted as such. The question is: What was the real meaning of this transaction? Was it an absolute sale or a transfer by way of security? The question is one of some difficulty depending upon the construction of documents, not wholly unambiguous, and upon a consideration of all the surrounding circumstances. Very little light is thrown upon the transaction by what has occurred since, or by the oral evidence on the one side, or on the other, which, to say the least, does not merit implicit confidence. The Judge of first instance, the District Judge of Shwegyin, decided in favour of Kader Moideen. His decision was reversed on appeal by the Commissioner of the Tenasserim Division. The Commissioner's judgment was affirmed by the Judicial Commissioner of Lower Burma, from whose Court the present appeal is brought.

The waste land rules, to which reference has been made, were a collection of regulations authenticated by the signature of the Officiating Secretary to the Chief Commissioner of British Burma and published by the Government of India (Foreign Department) under date 30th of June 1863. All unassessed waste lands, not subject to any private rights of proprietorship

or exclusive occupancy, were to be available for purchase in lots not exceeding 5,000 acres. But the same person might apply for two or more lots. Applications for purchase were to be entered in a register. There was to be a rough survey, and then, if the application was found to be in order, the land applied for was to be advertised for sale by auction at an upset price on a day named in the advertisement. Government sales were to be held quarterly. Sales were to be entered in a register in a prescribed form, containing separate columns for all necessary particulars, the last column No. 15 being headed : "Remarks in which are to be entered all transfers subsequent to the sale and the names of the persons to whom transferred." Rule 12 provided that, on payment of one-tenth of the purchase money and of all expenses of survey, demarcation, advertisement and sale, the purchaser should "receive a deed in the Form D annexed signed by the Deputy Commissioner, conveying to him the lot in full hereditary and transferable proprietary right free for ever from all demands on account of land revenue." The 18th rule provided that the purchaser might pay the whole of the purchase money when the lot was sold, or if he chose he might pay a portion, not being less than 10 per cent., at the time of the sale, and the remainder in instalments at any future time "not being more than ten years from the date of sale." In the latter case simple interest at the rate of 10 per cent. per year was to be charged on the unpaid portion of the purchase money, and the whole lot was to "remain hypothecated as security for the full discharge of the amount, including principal and interest, and be liable to sale by order of the Deputy Commissioner, if the said amount be not paid within the stipulated period." Interest on unpaid purchase money was to be payable on the 15th of May in each year.

Form D—the prescribed form of conveyance—so far as material is as follows :—

"Know all men by these presents that the Chief Commissioner of British Burma has conferred on his heirs executors administrators and assigns the grant of a tract of land measuring British Statute acres situated in to be holden by him in full proprietary rights subject to the following conditions :—

"I. The purchase money for this grant is Rs. of which Rs. have been already paid. On the if the entire purchase money

1894

KADER MOIDEEN v. NEPEAN

has not been paid up interest at 10 per cent. per annum will be charged on the balance and thereafter until the entire purchase money be paid up such interest will be chargeable on all unpaid arrears of the purchase money and all payments by the grantee shall be first carried to the credit of any outstanding arrear of interest due on such purchase money.

"II. Arrears of interest shall be treated in the same manner as arrears of land revenue, and be subject to the same measures of realization.

"III. No transfer of proprietary right, or transfer of interest, or creation of new interest in the grant beyond a lease of three years, will be recognized by the Civil Courts or the Revenue Officers of Government, unless duly registered in the office of the Deputy Commissioner of the District in which the grant is situated.

* * * * *

"IX. On the payment of the purchase money in full with all arrears of interest the grant will belong to the grantee free for ever from all demand for land revenue."

It may be observed in passing that in Form D no period is limited for the payment of the balance of the purchase money. On the other hand no provision is to be found in the rules corresponding with Condition III in Form D. Nor is there anything in the rules purporting to give the force and efficacy of a conveyance to an entry in the register of sales of waste lands.

The three grants in favour of Kader Moideen were all in the prescribed form. The total quantity of land in the grants was about 4,524 acres. The aggregate amount of purchase money was Rs. 7,158-13-7. The amount paid up was Rs. 768-9-11. The annual amount of interest payable on the balance was Rs. 639 0-5.

Kader Moideen had not sufficient means to turn these waste lands to a profitable account. Nor could he afford to pay the purchase money in full and wait until the lands rose in value with the general improvement of the country under British rule. He was a poor man at the time, and such attempts as he made to develop the property were not remunerative. He brought a number of people upon the land who were to pay no rent for three or four years. They were collected in settlements which are dignified by the style of villages and hamlets. The settlers received a little money and some rice and perhaps a few buffaloes. They made some clearances round the settlements. But the undertaking did not prosper. Many of the settlers left; their places were not filled by others, and lands which had been reclaimed became jungle again.

In his difficulties Kader Moideen had recourse to Mr. John Nepean, a prosperous money-lender in Shwegyin, and obtained accommodation from him apparently on the usual terms and with the usual result. It was contended by the learned Counsel for the respondents that the money paid to the Government for interest while the lands stood in Kader Moideen's name was supplied by Nepean. Very probably that was so. The contention is certainly correct as regards the payments made in 1869 and 1870.

On the 6th of June 1870 Kader Moideen assigned his interest in the lands in question to Nepean by way of mortgage to secure Rs. 3,000, which Kader Moideen acknowledged to have received that day "in cash." He bound himself on or before the expiration of ten months to repay the loan with interest at the rate of 3 per cent. per month, the principal and interest being payable in a lump sum. In default Nepean was empowered to sell, and Kader Moideen undertook to make good any deficiency. Out of the sum secured Rs. 639-0-5 were paid to Government in discharge of interest. The balance all but a few rupees consisted of old debts and arrears of interest. The mortgage is in English, a language which Kader Moideen did not understand. It is referred to as Exhibit F.

In the year 1871, as the time approached for payment of interest to the Government, Kader Moideen was at his wit's ends for money. Twice apparently he had been put into jail for non-payment of some judgment-debts, and twice he had been released on proof of his inability to pay. Nepean refused to lend him anything more, and he had neither cash nor credit.

On the 12th of May 1871 Kader Moideen presented a petition in the Court of the Deputy Commissioner of Shwegyin setting forth the Government grants, and alleging that he had given buffaloes and food to poor people to clear the land. Then he complained that the people on the land had been interfered with, and that he had lost a large amount of money, and he prayed the Court to make an inquiry according to the law and pass such order as the Court might think proper.

On the following day, the 13th of May, Kader Moideen presented another petition complaining that his petition of the 12th of May had been rejected, and suggesting that if no inquiry

1894

KADER MOIDEEN v. NEPEAN.

were made on that petition "no benefit would be derived for the monies which had been paid by him," and adding that he thought that no benefit would be derived "if he paid the money due for the present year," and therefore he prayed that, if the Government did not wish to settle the matter in respect of the land, monies which had already been paid by him might be refunded to him and the land taken posssesion of.

It was suggested, and it seems not improbable, that these applications were made merely with the view of procuring some indulgence from Government.

On this petition the Deputy Commissioner Major Duff passed an order stating that he declined to go into vague general complaints, but adding "if petitioner wishes to give up the land let him state exactly the terms on which he will relinquish it, and he will meet with every encouragement free [? from me]."

Nepean came to hear of these applications, and naturally he was alarmed for his security. So he presented a petition which, after stating that he had a lien on the three grants, and that he had heard of Kader Moideen's application, proceeded as follows :—

"Your petitioner begs that the waste land rules referred to in the grant (section 2) now in his possession may be carried out and orders issued accordingly.

"That if Kader Moideen be unable to pay the interest due to Government, your petitioner may be allowed to occupy his place in the matter after the above rules have been carried out.

"That your petitioner is ready to produce these three grants and the mortgage bond held by him to prove his claim."

The order passed was :—

"The time given for payment has not yet expired, and in such cases a little grace is always allowed, so that at present I am unable to pass any definite order in the matter.

"A. G. DUFF,

"15th May 1871."

On the 20th of May 1871 before the Deputy Commissioner a report was read stating that Kader Moideen had failed to pay Rs. 639-0-5 due on the 15th of May. The matter was ordered to stand over till the 25th ; but as regards Nepean's application an order was made that notice should be issued to him to appear on the 23rd, if he should think fit, and show cause why his claim

to intervene should not be rejected under section 3 of the grant.

Nepean appeared on the 23rd and presented another petition alleging that a transfer of interest had been created by the mortgage of the 6th of June 1870, and the deposit of the three grants, and after protesting against Kader Moideen allowing the Government to resume the land before satisfying his claim he stated that, in the event of the Government not being able to recover their dues on the land from Kader Moideen, he would be willing to make good the amount, so that the Government would be no loser by the transfer.

The Deputy Commissioner having heard Nepean on the subject rejected his application and deferred the case as against Kader Moideen till the 26th.

On the 26th of May it was ordered that notice be served on Kader Moideen conformably with section 1, Rule 46 of the Revenue Rules that, in default of payment within the time therein specified, the land would be liable to be sold.

So far Kader Moideen and Nepean had been working separately each for his own interest. The next thing is that they come before the Court with a concerted application. On the 29th of May they present a petition in Burmese, of which the Judge of first instance gives the following translation certified by him to be correct :—

"In the Court of the Deputy Commissioner, Shwegyin.

"The joint petition of Kader Moideen, land owner, and Mr. Nepean,—

"Humbly sheweth,

"1.—That whereas Mr. Nepean desires to transfer to his own name from the name of Kader Moideen the land comprised in three grants that have been made to Kader Moideen, Kader Moideen consents to the name being changed.

"2.—That Mr. Nepean for his part will pay now the price due for these lands, together with Rs. 639-0-5 interest due, if the three grants owned by Kader Moideen are transferred to the name of Mr. Nepean.

"Wherefore we have both come to an agreement, and pray that the three grants be transferred from Kader Moideen's name to Mr. Nepean's.

"Signature of

"KADER MOIDEEN.

"29th May 1871. "J. NEPEAN."

1894

KADER MOIDEEN v. NEPEAN.

The order on the petition was—

"The matter requires consideration; a definite order will be passed to-morrow.

"A. G. DUFF.
"29th May 1871."

On the next day the following order was passed :—

"Rangoon, the 30th May 1871.

Kader Moideen, Mr. Nepean, both present.

Read petition of Kader Moideen and Mr. Nepean requesting that the lands in question may be transferred to the latter. . . . . .

Court.—As Mr. Nepean is fully aware of the circumstances of the case, and that in taking over the land he takes with it the responsibility for what is due to Government on it, I see no objection to the transfer being made and therefore—

Order—Transfer to be made as requested.

A. G. DUFF."

On the 3rd of June Kader Moideen and Nepean again attended before the Deputy Commissioner, and the following note in English was entered in column 15 of the register of sale of waste lands against each lot :—

"Ownership transferred by original purchaser Kader Moideen to John Nepean on the third day of June 1871.

KADER MOIDEEN,
(in Native character),
Original purchaser.
J. NEPEAN,
New holder.

Before me, A. G. Duff, Deputy Commissioner."

On the same day a memorandum in the same words signed and attested in the same manner was endorsed on each of the three Government grants.

On the 5th of June Nepean paid into the Government Treasury Rs. 639-0-5 on account of interest and Rs. 3,390-3-8 on account of principal in respect of the lands transferred into his name on the 3rd of June. In the waste land register this sum was apportioned so as to pay up in full the purchase money of two of the lots leaving a balance due on the third.

On the 12th of June Nepean paid into the Government Treasury the sum of Rs. 3,041-5-4, which discharged in full all claims of the Government in respect of the property.

As soon as Kader Moideen realized the fact that the effect of the transfer was that he was put on one side altogether he repented of the bargain. He presented two petitions to the Court making random allegations and asking for relief on grounds more or less absurd. The Court refused to listen to him as he had transferred the property. Nepean presented a counter-petition and obtained a certificate that the land was legally transferred to him. Then Kader Moideen sued for the balance of the money expressed to be secured by the mortgage of the 6th of June 1870 which he alleged he had never received and he applied for leave to sue as a pauper. But this application met the fate of the rest. It was ultimately rejected on the ground that his statements on cross-examination were not satisfactory.

Baffled at all points, outcast and bankrupt, Kader Moideen went away to Toungoo, a place distant about three days' journey from Shwegyin. There he seems to have lived ever since. Lately in the disturbances which followed the annexation of Upper Burma he made some money by Government contracts, and then, as he alleges, he sent a message to Mrs. Nepean asking her to furnish accounts of the rents and profits of the lands which he had transferred to her husband. After some little delay a formal application to the like effect was made on his behalf. It was refused, and then the present suit was brought against the respondents.

Among other defences, to which it is not necessary to refer, the principal defendants set up that the transfer to Nepean was an absolute and unconditional transfer, and that Nepean agreed, in consideration thereof, "to cancel the said mortgage of 1870, to release the plaintiff from his covenant to repay the 3,000 rupees and interest secured thereby and other debts, and to pay and indemnify the plaintiff from all liability to pay the balance of the purchase money of the said land and the interest due thereon."

The evidence of the witnesses on behalf of the plaintiff at the trial is not worth much attention. No statement by the plaintiff himself can be accepted without corroboration. There were witnesses who said they heard Nepean tell Kader Moideen that he could redeem the land at any time. One of them was a subordinate officer of the Court who remembered drafting the

1894

KADER MOIDEEN v. NEPEAN.

joint petition of the 29th of May 1871. Another was a person who is described by the principal witness for the defence with some breadth and freedom of outline as "an East Indian gentleman of sorts," but who seems to have been neither more nor less than an itinerant hawker of jewellery. Another was a person who is now a *myook* or township officer. The learned Judge of first instance gave weight to his evidence on the ground of his position and also on the ground of his age. The latter consideration is not unimportant having regard to the habits of the people and the teachings of their religion. "His age," observes the learned Judge, "is in his favour. He is 59, and the older a Burman the more truthful." But however respectable these gentlemen may be, and whatever may be their claims to attention, it would be dangerous to rely upon the recollection of witnesses as to conversations which took place twenty years back.

The principal witness on behalf of the defence was a Mr. Moss who claims one-fourth of the property. He was at one time in the police force, and is now apparently a certificated advocate. He had married a daughter of Nepean and was very intimate with him. Nepean always "consulted" him "about his private affairs" and got his "help to write petitions." He wrote the mortgage of the 6th of June 1870—a well-drawn instrument, except that one statement in it certainly is not quite in accordance with the facts. According to his own account he took part in the negotiations which led to the arrangement in question, and in his examination in chief he gave a list of the debts from which he said Nepean agreed to release Kader Moideen. Much must depend upon the view which is to be taken of his evidence.

Of the judgments which have been pronounced in this case it is enough to say that the judgment of the District Judge of Shwegyin is a very painstaking and able review of the evidence before the Court. The judgments of the other learned Judges seem to be more concerned with questions as to the admissibility of evidence than with the facts and circumstances of the case.

The learned Counsel for the respondents did not contend that any evidence tending to throw light upon the real meaning of the arrangement between the parties ought to be excluded; but they suggested that the proper course would be to take the

joint petition of the 29th of May 1871, the orders made upon it, the entries in the register of waste lands, and the note or memorandum endorsed on each of the three deeds of grant, and to consider the effect of those documents by themselves apart from the rest of the evidence ; if the transaction so regarded presents the appearance of an absolute and unconditional transfer then, they said, arises the question whether the rest of the evidence is sufficient to displace the *primâ facie* view of the transaction. That was a very plausible way of putting the case for the respondents, and it was urged with much force and ability by Mr. Fox as well as by his learned leader. But in their Lordships' opinion the learned Counsel laid too great stress on the endorsements upon the deeds of grant, and rather overlooked the effect of the statements in the joint petition.

It may be conceded that if the Court had nothing but the endorsements before it, the proper inference would be that for some consideration or other, which was not disclosed, the property had been made over to Nepean by way of sale. But when the joint petition, and the orders made upon it, are examined it becomes apparent that the entries in the register of waste lands were intended merely to give effect to the prayer of the petition, and that the endorsements on the deeds of grant are nothing more than a record of the arrangement proposed by the parties and sanctioned by the Deputy Commissioner. The petition asks that the lands may be transferred into Nepean's name. But that is not all. It purports to proceed upon an arrangement that Nepean shall forthwith pay the arrears of interest due to the Government and the balance of the purchase money. What is the effect of this arrangement ? If the transaction were an absolute sale, or even an out and out gift, it would have been immaterial to Kader Moideen whether Nepean paid the balance of the purchase money or not. On the other hand, if the transaction was really a transfer by way of security, the condition that the purchase money should be paid up at once was some consideration for the transfer and a stipulation essential for the complete protection of Kader Moideen. When once the purchase money was paid in full the right of redemption would not be liable to be defeated by failure on the part of Nepean to fulfil the condi-

1894

KADER MOIDEEN v. NEPEAN.

tions of the Government grants. It may be suggested perhaps that Nepean's undertaking to pay the purchase money was not a stipulation in favour of Kader Moideen, but merely an offer intended to gain the favourable consideration of the Government. But the answer is that that is not the natural meaning of the language of the petition, nor was it so understood by the Deputy Commissioner. The Deputy Commissioner warned Nepean that in taking over the land he was taking with it the responsibility for what was due to Government. But he did not suggest that Nepean, as between himself and the Government, was assuming any greater responsibility. He did not propose to alter the conditions of the Government grants, or to bind Nepean to pay up the whole purchase money at once. In fact he completed the transfer in the waste lands register before Nepean paid anything on account of either principal or interest.

The result, therefore, in their Lordships' opinion is that on a view of the transaction thus limited, it could not have been the intention of the parties that there should be a transfer outright depriving Kader Moideen of all interest in the property.

In connection with this part of the case it may be stated that the District Judge points out that the Burmese word which would naturally be used to describe a transfer out and out, and which Mrs. Nepean, a Burmese lady, does use in her evidence to describe the transaction, is not found in the joint petition of the 29th of May 1871. It is, said the learned Judge, "conspicuously absent."

The next question is this: Can any reliance be placed on Mr. Moss' statement that the consideration for the transfer was the cancellation of all debts then due from Kader Moideen? According to Mr. Moss' story there were many interviews between Kader Moideen and Nepean in connection with the matter, and the final bargain was made in his presence on the evening of the 28th May. His account of it is as follows:—

"Mr. Nepean said the land must be made over to him entirely and no other rights allowed. It was further agreed that upon the land being entirely made over all debts due from Kader Moideen to Nepean should be cancelled. It became late when the interview ended—it took place in Mr. Nepean's house—

the bargain was that they should present a petition next day. The debts referred to were the money due on Exhibit F and also on some promissory notes Exhibits 1, 2, 3, 4, 5, and 17."

That account has an air of precision, but it is a careless statement at best. On cross-examination Mr. Moss admitted that on one of the notes, Exhibit 1, (which was the largest in amount and only Rs. 100 short of all the rest put together) there was endorsed a memorandum, dated the 6th of June 1870, showing that that document did not at the time of the alleged bargain represent an existing liability on the part of Kader Moideen. It had been merged in the mortgage security of the 6th of June 1870. When he gave his evidence in chief Mr. Moss must have been either aware or ignorant of this indorsement. If he was aware of it his evidence was intentionally misleading. If he was ignorant of it his recollection of the arrangement between Kader Moideen and Nepean is obviously not entirely trustworthy. Of the other documents (Exhibits 2, 3, 4, 5 and 17) two purport to be given to Mr. Nepean ; the other three, in which the interest is at a higher rate, amounting in one instance to 108 per cent. per annum, purport to be given to both Mr. and Mrs. Nepean. Now it is not a little startling to find that Exhibit F and all these documents were retained by Mr. Nepean until his death without anything to show that they had been cancelled by the arrangement of May 1871. It was said, and said truly, that Kader Moideen, who by the way was never worth suing during Nepean's life, was never sued upon any one of them. But that does not destroy or affect the inference to be drawn from their retention. Why should they have been retained? It was contrary to Nepean's practice. Mr. Moss admits that "when documents were cancelled his practice was to return them." It was suggested that Nepean was justified in retaining Exhibit F as a document of title relating to the lands made over to him. That may be an excuse for retaining it, but it is no excuse for retaining it uncancelled. No such excuse, however, applies to the case of the other exhibits. It was said that it was not wrong on the part of Nepean to keep these documents if he did not mean to sue upon them ; but if Nepean had died before they were statute barred, and Kader Moideen had been then

1894

KADER MOIDEEN v. NEPEAN.

worth suing, and had been sued, he would have had probably no defence to an action by Nepean's legal representatives, and certainly none to an action by Mrs. Nepean. Then there was another excuse. It was said that Kader Moideen was a troublesome person, as indeed he seems to have been, and that Mr. Nepean was justified in not performing to the full his part of the bargain until Kader Moideen executed an absolute conveyance of the property in his favour; but Nepean never set this case up in his lifetime. His case was that the transfer entered in the Government books and recorded in the endorsements on the deeds of grant was sufficient and complete, and that nothing more was required; and, if Mr. Moss is to be believed, Nepean never asked for anything more. "I don't know," he says, "of any efforts being made after the transfer in 1871 to get Kader Moideen to sign a regular conveyance of the land."

If matters stood there, and there were nothing more in the case, the inference from the retention of the documents in question would be very strong; but it seems to be irresistible when the circumstances connected with one of these documents (Exhibit 5) are examined.

Exhibit 5 purports to be dated the 25th of June 1869, and to be a security for a loan of Rs. 300. It is not merely a bond or note binding Kader Moideen personally, but it is also a mortgage of his house in Shwegyin to secure the sum borrowed with interest at 3 per cent. per month. This house was not situated on any part of the lands comprised in the Government grants. So Mr. Nepean could not have had the excuse for retaining it, which it is alleged he had for retaining Exhibit F. If Mr. Moss' statement is correct, the house ought to have been released, and the mortgage itself handed back to Kader Moideen when the lands were transferred to Nepean. Now the subsequent dealings with this house can be traced in the record. When Kader Moideen applied for leave to sue as a pauper in September 1871 he had to file a list of property belonging to him and to account for it. In that list is to be found this entry (p. 76, Exh. V.) "a house mortgaged to Mr. Nepean. It is now under attachment." Upon this list he was examined before the Sikke or subordinate officer. In his deposition (p. 104, l. 11) he said: "I have never paid money

as interest on the money for which I mortgaged my house to the defendant as shown in the list filed by me." His object of course at that time was to show that he had no beneficial interest in the house by reason of the charge upon it in favour of Nepean. It does not appear whether Nepean was present at that examination or not; but he certainly was present at the cross-examination of Kader Moideen upon this deposition (p. 95) when the proceedings were removed to the Court of the Deputy Commissioner. It is not a little remarkable that Kader Moideen was asked no questions about this house. That it was still in mortgage to Mr. Nepean and under attachment seems to have been common ground. If the truth had been that the mortgage was cancelled, and that Kader Moideen was the unencumbered owner, there would have been an answer at once to his application for leave to sue as a pauper. Then it is stated in Kader Moideen's evidence in this suit, and not contradicted by Mr. Moss, that the house was actually sold under the attachment, that it came into Mr. Moss' possession, and that Kader Moideen was turned out. Mr. Moss' statement is, therefore, disproved in the only instance in which it was possible to test its accuracy, and, consequently, their Lordships have no hesitation in rejecting it entirely.

BENGAL SECRETARIAT LIBRARY

The probabilities of the case remain to be considered. From the evidence before the Court it is easy to see what manner of man Kader Moideen was, and what was the exact position of the parties at the time the arrangement was made. Kader Moideen had staked his all upon this property. He seems to have spent upon it everything he had and everything he could borrow. It was the only thing he had to look to. He evidently fancied that it was of great value. That it was of some value is plain from the Deputy Commissioner's reply to his petition of the 13th of May 1871, and plainer still from Nepean's own conduct. Kader Moideen clung to the property desperately. He was a reckless and an unscrupulous man and certainly had no consideration for his chief creditor. It is inconceivable that he should have consented to give the land to Nepean without stipulating for some benefit for himself. He was under no personal liability to the Government. The only remedy the Government had was against the land. As regards his debts to Nepean he was

1894

KADER MOIDEEN v. NEPEAN.

secure in his impecuniosity. To such a man as he was a release from debts, which he could not possibly pay, and for which in all probability he would never be troubled, was no benefit at all. Mr. Nepean was quite at his mercy. He had simply to do nothing, and the land would be forfeited, and Mr. Nepean's chance of saving anything from the wreck would be gone. On the other hand it was well worth Nepean's while to give something to get the land into his own hands. He thought so too. There is a significant passage in Mr. Moss' evidence. In the course of the negotiation which led to the final arrangement the position which Nepean took up according to Mr. Moss was not that he had advanced as much as the land was worth, and that he would not throw good money after bad. His refusal to give any further assistance was based on the precarious nature of the title. What he said to Kader Moideen according to Mr. Moss was, "I refuse altogether to advance you more money, because I find you have not got a full title to the land." Mr. Moss it seems and Mr. Nepean had been studying the waste land rules together, and they were alarmed by the provision in Rule 18 as to hypothecation. No wonder Mr. Nepean was puzzled by the word. "He was not a good English scholar." Later on Mr. Moss adds: "Mr. Nepean did not understand written English fully, and that is an instance." Mr. Moss who referred to books "in connection with this transfer of land" came to the conclusion that the title was not secure so long as any part of the purchase money remained due to the Government.

It must be added that "it is indeed a common custom in Burma when land is mortgaged, even when only for a short term of years, to transfer it into the name of the mortgagee in the revenue registers." So says the District Judge, and the statement was not controverted.

Under these circumstances the arrangement that would naturally suggest itself would be that Nepean should pay up all that was due to Government for principal and interest, and hold the land in his own name to recoup himself for everything he had advanced and for all he might have to spend in order to make the land profitable. Kader Moideen would be flattered with the hope of redeeming the land some day. Such a prospect or dream would be

likely to take the fancy of such a man as Kader Moideen. And no doubt it would seem to Nepean at the time that he was making an empty concession, and that nothing more would be heard of Kader Moideen after he was once dispossessed.

It was said in the course of the argument that a decision in Kader Moideen's favour would involve an imputation of fraud upon a dead man, and that seems to have been the view of the Courts below; but it is to be observed that Nepean never asserted that he had bought the land from Kader Moideen. Kader Moideen had "abandoned" it. It was "legally transferred" to him. But there was no suggestion of a sale. That case was not set up until after his death—nor was he ever called upon to allow Kader Moideen to redeem. It is not by any means clear that he would have resisted a suit for redemption if such a suit had been brought in his lifetime.

As regards the terms of redemption Kader Moideen states that the land was to be retransferred to him when he repaid all he owed and all Nepean paid on account of the land to Government, and that the interest was to be 10 per cent. and to be compound interest. It was said there was no proof in support of these statements and that they rested on Kader Moideen's word alone. That is true. But they are statements in some degree against his interest; and having regard to the rate of interest payable to Government, it seems not improbable that such an arrangement should have been made. If there is to be redemption the terms are certainly not unfavourable to the persons in possession, and Kader Moideen must be held to them. As regards moneys laid out in improvements the decree as originally framed gave no interest. On the application of the defendants with the consent of the plaintiff the decree was varied so as to give simple interest. But the rate of interest was not specified. The rate of interest will be the same as the rate of interest on the moneys paid to the Government. Probably the decree as it stands would be so construed. But in order to prevent any possible misunderstanding the decree will be varied by leaving out the word "interest" in paragraph 2 and inserting "simple interest at the rate of 10 per cent. per annum."

In the result their Lordships will humbly advise Her Majesty

1894

KADER MOIDEEN v. NEPEAN.

that the judgment of the Judicial Commissioner and the judgment of the Commissioner of the Tenasserim Division should be reversed and the decision of the District Judge restored with the variation above mentioned.

The respondents must pay the costs of this appeal and the costs in the three Courts below.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lattey & Hart.*

Solicitor for the respondents: Mr. *B. R. Heaton.*

C. B.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1894 *May* 14.

KHETTERPAL SRITIRUTNO *v.* KHELAL KRISTO BHUTTACHARJEE AND BY REVIVOR KALLY CHURN BHUTTACHARJEE AND OTHERS *v.* DURGA CHURN BHUTTACHARJEE AND OTHERS, AND IN THE MATTER OF SUIT 334 OF 1889. SRISTIDHUR COUCH *v.* KALLY CHURN BHUTTACHARJEE AND OTHERS.*

Costs—Civil Procedure Code (Act XIV of 1882), s. 222—Costs of partition charged under that section on shares of parties in partition suit—Mortgage by one sharer of undivided shares—Liability for costs of partition of mortgagee not party to partition suit—Application in suit by person not party to suit—Remedy by supplemental suit—Procedure.

K. S. and *K. B.* were joint owners of certain properties. In 1886 *K. S.* mortgaged his undivided share to *S. C.* in consideration of a loan advanced by *S. C.* to him. In 1887 *K. S.* brought a suit, to which *S. C.* was not made a party, against *K. B.* for partition, and on 27th April 1888 obtained a decree under which a commission of partition was issued. In the course of the suit both *K. S.* and *K. B.* died, *K. B.* on 2nd September 1888, and *K. S.* on 30th March 1892, and by orders of Court their sons were put on the record in place of their respective fathers. The return to the commission of partition was made on 24th February 1892, and on 20th July 1893 an order was made confirming the return, and, under section 222 of the Civil Procedure Code, charging the costs of suit and of the commission of partition to the shares of the plaintiffs and defendants, respectively, in the suit. Meanwhile in July 1889 *S. C.* brought a suit on his mortgage and obtained a decree, dated 5th August 1889, for an account and sale, and in that suit a final order for sale was made

* Application in Original Civil Suits Nos. 217 of 1887 and 334 of 1889.

on 5th January 1891, which however was only filed on 19th August 1893. Under that order the property was advertised for sale, the return to the commission of partition being set out in the abstract of title as part of the title, and the property to be sold being described as a divided moiety. In an application, made both in the partition and mortgage suits, by the defendants in the partition suit, for an order for sale of a portion of their share of the property in order to pay the costs of the suit and of the partition and other debts and liabilities for which they were liable, *Held*, that the mortgagee having had the benefit of the partition, and having accepted and approved of it as part of his title, as shown by the proceedings for sale, was, though not a party to the partition suit, bound by the equities attaching to the mortgaged property as incidents of the partition. He was therefore liable in respect of a proportionate share of the charge for costs of the partition created by the order of Court made in that suit under section 222 of the Civil Procedure Code, and such proportionate share of those costs should be deducted in priority out of the proceeds of the sale of the mortgaged property.

The defendants in the partition suit, however, not being parties to the mortgage suit, such an order could not be properly made at their instance, but they should enforce the charge for costs against the mortgagee by supplemental suit, and the Court stayed the sale of the property for a reasonable time to give the parties an opportunity of moving for stay of the sale in any such suit as might be instituted.

THIS was an application by Durga Churn Bhuttacharjee and Uma Churn Bhuttacharjee, two of the defendants in a revived partition suit No. 217 of 1887, in which a decree for partition had been made, and a commission of partition issued, that the Registrar might be at liberty to sell certain property and pay thereout their debts and liabilities, and the costs of the suit, and of the commission of partition.

The petition stated that by a decree made by the High Court on 27th April 1888 in a suit (217 of 1887) brought by Khetterpal Sritirutno against Khelal Kristo Bhuttacharjee, the plaintiff and defendant were declared to be jointly entitled to certain property in equal shares, and it was ordered that the property should be partitioned between them, and that a commission of partition should issue, and accounts and enquiries were directed to be taken: (1) an account of the rents and profits of the property which may have come into the hands of the parties respectively or to other persons by their order or for their use; (2) an enquiry as to what were the valid and subsisting debts owing by

1894

KHETTERPAL SRITIRUTNO v. KHELAL KRISTO BHUTTACHARJEE.

the joint family; and (3) how such debts were to be provided for; that by the said decree it was also ordered and decreed that the parties should pay their own costs of the suit up to and including the decree to be taxed by the taxing officer of the Court as between attorney and client on scale No. 2, and that the expenses of the commission of partition should be borne by the parties in proportion to the value of their respective shares; that on 2nd September 1888 Khelal Kristo Bhuttacharjee died, and his five sons (two of whom, the petitioners Durga Churn Bhuttacharjee and Uma Churn Bhuttacharjee, were adults, and the three others Gouri Churn Bhuttacharjee, Bhabani Churn Bhuttacharjee, and Umbica Churn Bhuttacharjee were minors under 18 years of age), were by an order of Court, dated 28th February 1889, put on the record as defendants in the place of their father; and they duly entered appearance in the revived suit, and by an order of Court, dated 26th July 1889, Nundo Lall Mookerjee was appointed guardian *ad litem* of the minor defendants; that in pursuance of the decree of 27th April 1888 a commission of partition was issued to the Registrar of the Court to make the partition as directed by the decree; that on 30th March 1892, pending the proceedings for partition before the said Commissioner, the plaintiff Khetterpal Sritirutno died, leaving six sons his heirs and representatives; that on 24th February 1892 the Commissioner made his return to the commission of partition, whereby he allotted to the plaintiff a moiety of the properties in suit, and the remaining moiety to the substituted defendants in the suit; that on 10th May 1892 by order of Court the suit was revived and the names of the sons of the plaintiff, namely, Kally Churn Bhuttacharjee, Tara Churn Bhuttacharjee, Bhoirab Chunder Bhuttacharjee, Bogola Churn Bhuttacharjee, Tripura Churn Bhuttacharjee, and Matungee Churn Bhuttacharjee (the last of whom was a minor, for whom his brother Kally Churn was appointed next friend) were put on the record of the suit in the place of their father Khetterpal Sritirutno; that on 20th July 1893, the Court, on the suit coming on for hearing for further direction, confirmed the return of the Commissioner, ordered that the parties should be put into possession of their allotments under the partition, and that the costs of all parties of the suit and commission of partition should

form a charge on the respective shares allotted by the return to the commission of partition ; that the costs (together with debts and liabilities due by the estate of Khelal Kristo Bhuttacharjee) amounted to a sum which the petitioners had no means of paying except by sale of a portion of the property allotted to them and the other defendants on the partition ; that the share of the plaintiffs in the joint properties, was, before the institution of the partition suit, mortgaged to one Sristidhur Couch, who on 5th August 1889 had obtained a decree in a suit (334 of 1889) brought on his mortgage, and under an order of the 5th January 1891 had caused the property to be advertized for sale on 31st March 1894 ; and that the mortgagee had obtained a material benefit from the partition, inasmuch as his mortgagor's interest was now decided and ascertained.

The petitioners asked, therefore, for an order that the Registrar should be at liberty to sell so much of the properties allotted to them and the minor defendants as might be necessary for payment of the costs of the suit and commission of partition and the debts and liabilities of the defendants, and out of the proceeds pay such costs and debts and liabilities, and also out of the proceeds of sale in suit No. 334 of 1889, in which Sristidhur Couch was plaintiff, and Kally Churn Bhuttacharjee and others were defendants, pay the proportionate share of the costs of the commission of partition payable by the plaintiffs to the petitioners and the minor defendants in the suit.

From an affidavit filed on behalf of Sristidhur Couch, the plaintiff in suit No. 334 of 1889, it appeared that the plaintiff Khetterpal Sritirutno had mortgaged to him on 11th January 1886 his undivided half share in the property, the subject of the partition suit, for Rs. 15,000 with interest at 10 per cent. ; that, on default being made in payment of the amount, suit No. 334 of 1889 was instituted in 1889 against Khetterpal Sritirutno on the mortgage, and on 5th August 1889 Sristidhur Couch obtained a decree in that suit, under which the sum of Rs. 22,000 odd was found on the report of the Registrar, which was duly confirmed by the Court, to be due to him, and a day was fixed for the payment by the defendant of the sum due ; but default was made in payment, and Sristidhur Couch obtained

1894

KHETTERPAL SRITIRUTNO v. KHELAL KRISTO BHUTTACHARJEE.

an order, dated 5th January 1891, for sale of the property; that after the death of Khetterpal Sritirutno the suit was revived against his sons who were substituted for their father as parties defendants on the record; and that under the order of the 5th January 1891 the property had been advertized for sale on 31st March 1894, on behalf of Sristidhur Couch. It was therefore submitted that there were no grounds for the application.

Mr. *R. Mitter* for the applicants.

Mr. *T. A. Apcar* for the minor defendants in suit 217 of 1887.

Mr. *Chuckerbutty* for the plaintiffs in suit 217 of 1887.

Mr. *Sinha* for the mortgagee (plaintiff in suit 334 of 1889.)

SALE, J.—This application is free from doubt except so far as it seeks to affect the plaintiff in the mortgage suit.

The facts are briefly as follows: Khetterpal Sritirutno and Khelal Kristo Bhuttacharjee were joint owners of certain properties.

On the 11th of January 1886 Khetterpal Sritirutno executed a mortgage of his undivided share in most of these properties in favour of Sristidhur Couch to secure the repayment of a loan obtained from him. In 1887 Khetterpal brought this suit against his co-owner for an account and partition and obtained a decree, dated 27th April 1888, under which a commission of partition was issued. The Commissioner's return is dated 24th February 1892.

In the course of the proceedings both the original plaintiff and the original defendant died, and there was considerable delay in reviving the suit.

On the 20th July 1893 an order was obtained confirming the return and charging the costs of suit and of the partition upon the properties, the subject of the suit.

In July 1889 Sristidhur Couch brought a suit upon his mortgage, and on the 5th of August 1889 obtained a decree for an account and sale. The Registrar's report on the result of the account is dated 24th January 1890. A final order for sale was obtained on the 5th of January 1891, but it remained unfiled for two years and seven months, that is until the 19th August 1893, a month after the date of the order for the confirmation of the return. The mortgagee, though in a position to

proceed to a sale under the order of the 5th January 1891, waited until after the partition was completed, and until after the return was confirmed, his object obviously being to obtain the benefit of the partition which was being effected in the partition suit.

As the result of the partition the mortgage now attaches to a divided share. The costs of the partition by which this result has been obtained were charged upon the properties under section 222 of the Civil Procedure Code. This section is a new provision, the object of which is to secure the payment of costs, and it is of special value in partition suits to which it is now generally applied. The mortgagee is entitled to the benefit which has resulted from the partition, but the question is whether he can claim that benefit, and at the same time disclaim liability in respect of the charge for costs created by the Court under an express provision of the Code. His contention is that not being a party to the partition suit he is not bound by the order creating the charge.

A mortgagee is not a necessary party to a partition suit, but he may, and frequently does, obtain leave to attend the proceedings as a quasi-party. The mortgagee in the present case did not obtain leave to attend the proceedings in the partition suit, but in the relation in which he stands to the mortgagor he is equally with him bound by the partition. It would of course be open to him to impugn the partition on the ground of fraud, but there is no suggestion of any such ground of complaint existing in the case. On the contrary, it appears from the proceedings before the Registrar under the order for sale that the return of the Commissioner is set forth in the abstract of title as part of the title, and the property to be sold is described in the notification of sale as the divided northern moiety. The mortgagee has thus signified his approval and acceptance of the return. He objects to nothing connected with the partition proceedings except the order confirming the return, so far as it directs the costs to be charged on the property. Is he entitled to say that his title, though derived from the mortgagor, is yet so distinct as to be free from the equities attaching to the property as an incident of the partition? The point is new. The mortgage

1894

KHETTERPAL SRITHRUTNO v. KHELAL KRISTO BHUTTACHARJEE.

having been executed prior to the institution of the partition suit, the doctrine of *lis pendens* does not apply. If, however, the mortgagee had proceeded to a sale pending the partition, the purchaser would have become a necessary party to the partition suit, and would in the matter of costs have been subject to the liability of his predecessor in title. Is the mortgagee entitled to be placed in a better position? In my opinion the mortgagee, having adopted the partition proceedings, and having accepted the divided share, must take this share subject to the charge for a proportionate share of the costs of the partition as distinguished from the costs of suit, and this proportionate share of the costs ought to be deducted in priority out of the sale-proceeds of the mortgaged property.

It is objected, however, that this order cannot be made at the instance of the defendants in the partition suit, who are not parties to the mortgage suit. This objection, though purely technical, is not without force, and, being pressed, I shall give time to the present applicants to take the necessary steps by supplemental suit or otherwise to enforce this charge for costs as against the mortgagee. This application, therefore, so far as it affects the mortgagee, must stand over for disposal until after hearing of the new suit. The property if sold with notice of the charge cannot be expected to fetch its full value, and such sale would probably be followed by litigation. I shall therefore direct the sale to stand over for a reasonable time in order to give the parties an opportunity for moving for stay of the sale in any new suit which may be instituted.

An order in terms of the remaining part of the application will be made.

Attorney for the petitioners: Baboo *W. C. Bonnerjee.*

Attorney for the minor defendants: Baboo *Bepin Behary Bonnerjee.*

Attorney for the plaintiffs in suit No. 217 of 1887: Messrs. *Remfry & Rose.*

Attorney for the plaintiff in suit No. 334 of 1889: Mr. *Swinhoe.*

J. V. W.

Before Mr. Justice Sale.

IN THE GOODS OF SEWNARAIN MOHATA (DECEASED.)

1894
Aug. 6.

Letters of Administration—Probate and Administration Act (V of 1881), section 3—Majority Act (IX of 1875), section 3—Application by person domiciled in State of Bikanir and of age by law of that State though under 18—Disability of minority, Period of, for aliens.

The words "any other person who has not completed his age of 18 years" in section 3 of the Probate and Administration Act (V of 1881), read with the preamble and section 3 of the Indian Majority Act, mean any other person not domiciled in British India. Section 3 of the Probate and Administration Act, therefore, fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but for any other persons whether they be aliens or not.

Where application was made by a person domiciled in the Native State of Bikanir (and who being more than 16 years of age had by the law of that State attained his majority, though he had not attained the age of 18) for letters of administration in respect of the estate of his father who had carried on business and left all his estate and effects in Calcutta: *Held*, that the applicant not having attained the age of 18 years, the application must be refused.

APPLICATION for letters of administration to the estate of Sewnarain Mohata, deceased.

The applicant Sreekissen Mohata was one of the sons of the deceased, and stated that his father, who was a Hindu governed by the Mitakshara law, and had carried on business in Burra Bazar in Calcutta under the name of Sewnarain Sreekissen, died in Calcutta on 14th June 1893, intestate, leaving him surviving Ancha Bibee, his sole widow, and two sons, the petitioner and Gopeekissen, then both minors; that on 11th July 1894, letters of administration to his estate and effects were granted by the High Court to his widow Ancha Bibee during the minority of the infant sons with effect within the province of Bengal; that Ancha Bibee died on 17th April 1894 without having administered the estate of Sewnarain Mohata; that the petitioner "is the eldest son of the deceased Sewnarain, and was born at Bikanir, in the territories of the Maharajah of Bikanir, on the 9th Maugh Buddee 1934, corresponding with 27th January 1878, and is now of the age of upwards of 16 years and five months; that your petitioner is not domiciled in British India but is a Hindu subject of the Maha-

1894

IN THE GOODS OF SEWNARAIN MOHATA.

rajah of the Native State of Bikanir, and as such has reached his majority upon attaining the age of 16 years."

The petitioner further stated that the deceased left no immoveable property, and had no other property except the stock-in-trade outstandings and profits of the shop in Calcutta.

Mr. *Pugh* appeared in support of the application.

SALE, J.—This is an application for letters of administration to the property and effects of the late Sewnarain Mohata. The deceased came from Bikanir in the territories of the Maharajah of Bikanir. He carried on business as a dealer in piece goods, and died in June 1893, leaving a widow and two sons, Sreekissen, the present applicant, and Gopeekissen. In July 1893 letters of administration to the property and credits of the deceased were granted to his widow during the minority of his infant sons. The widow has recently died, and now Sreekissen Mohata, the elder of the two sons, applies for letters of administration to his father's estate, which in British India consists of a business in piece goods which had been carried on by the deceased in his lifetime and by the widow after his death. The applicant says he is a little over the age of sixteen years, and that according to the law of his own country he has attained the age of majority. It appears from the verified petition of the mother, filed by her when she was applying for letters of administration, that a statement was made as to the age of Sreekissen, which I think sufficiently supports his allegation that he is now over the age of sixteen years: and for the purposes of the present application I will assume that, according to the laws of Bikanir, a person attains his majority at the age of sixteen years.

The question is whether, under the Probate and Administration Act, the applicant, being a major according to the law of his own country, is, notwithstanding that he is still under the age of 18 years, entitled to an order for letters of administration.

Section 3 of the Probate and Administration Act states that "'minor' means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and *any other person* who has not completed his age of eighteen years; and 'minority' means the *status* of any such person."

Section 13 of the Act provides that "letters of administration cannot be granted to any person who is a minor."

Turning to the Indian Majority Act, which is specifically referred to in the Probate and Administration Act, we find it stated in the preamble that the Act is intended to apply to persons domiciled in British India, and the preamble proceeds: "It is expedient to prolong the period of non-age, and to attain more uniformity and certainty respecting the age of majority than now exists." Then in section 3, after providing for the case of certain persons as to whom guardians may have been appointed and fixing the age of majority for such persons, it proceeds: "Subject as aforesaid, every other person domiciled in British India shall be deemed to have completed his majority when he shall have completed his age of eighteen years and not before."

The classification therefore adopted by the Probate and Administration Act, so far as the provisions relating to the age of majority are concerned, comprises first all that class of persons to whom the Majority Act applies, that is to say, persons who are domiciled in British India; and, next, the class consisting of "any other persons who have not completed the age of eighteen years." Obviously, therefore, if the classification is to be of an intelligible character, the words "any other person" must mean any other person not domiciled in British India, and therefore must include persons whether they be aliens or foreigners. If that be so, then the effect of section 3 as regards aliens is to provide that, when under the provisions of the Probate and Administration Act they seek the authority of the British Court for the purpose of dealing with property in British India, they must, before they can obtain such authority, be of the age of eighteen years. It was contended by Mr. Pugh that it must be taken that the Legislature, in fixing the age of disability under the Probate and Administration Act, must be taken to refer only to the case of persons domiciled in this country, and that it must not be assumed, unless there are clear expressions in the Act to the contrary, that the Legislature was seeking to attach the condition of disability to persons to whom no such condition of disability would attach under the laws of their own country.

Two cases were referred to by Mr. Pugh in support of his

1894

IN THE GOODS OF SEWNARAIN MOHATA.

contention—*Jefferys* v. *Boosey* (1) and *Macleod* v. *Attorney General for New South Wales* (2). In the former of these cases a passage at page 895 of the report was specially referred to. It is as follows: "The general rule is, that words in an Act of Parliament, and indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, and so, in fact, were not used, in that sense. Here the words to be construed are, 'author,' 'assignee' and 'assigns.' These words plainly comprehend aliens as well as others; and there is nothing, as it seems to me, in any part of the Act to show that they are to be restricted." That passage would seem to support what I venture to think is the natural construction of the section of the Probate and Administration Act, by virtue of which aliens would come within the words "any other person," as used in section 3. A further passage in the same case at page 926 of the report was also referred to. That passage is as follows: "The Legislature has no power over any persons except its own subjects, that is, persons natural born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must *primâ facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect."

It is here clearly indicated that the persons whose rights the Legislature would have a right to affect, besides persons domiciled within its jurisdiction, are aliens resident within the jurisdiction, or while they are within the jurisdiction.

The second case which has been referred to is much to the same effect. In that case a person who had married in the colony of New South Wales, and who, in the lifetime of his wife, married again at St. Louis in the United States of America, was, on his return to the colony of New South Wales, prosecuted for bigamy under a Colonial statute. It was held that the words "whosoever" and "wheresoever," though of universal application, must be understood as having been used by the Legislature subject to

(1) 4 H. L. C., 815. (2) L. R., 1 App. Cas., 455.

the well-known and well-considered limitation that they were only legislating for those who were actually within their jurisdiction and within the limits of the colony. The limitation as thus laid down is said to be found at page 459 of the report.

Now it appears to me there is nothing in either of these two cases which indicates that anything but the ordinary and natural construction should be placed on the words of the section of the Probate and Administration Act which defines the age of majority. And seeing that the action of the Legislature in fixing the age of majority at the age of 18 years is merely intended to apply to the cases of those persons who are seeking to deal with property within the jurisdiction of the Court, I do not think it can be said that the plain meaning of the section is to be set aside for the purpose of making the definition of the *status* of minority apply only to persons domiciled in this country. To my mind the words are express, and the limit of the period of disability is for the purpose of the Act fixed at 18 years, not merely for persons domiciled in this country, but for any other persons whether they be aliens or not.

The result is that I must refuse the application.

Application refused.

Attorney for the petitioner : *Mr. H. C. Chick.*

J. V. W.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BEHARY LALL TRIGUNAIT, FIRST PARTY (PETITIONER) *v.* DARBY, SECOND PARTY (OPPOSITE PARTY.)*

1894 *July* 24

Criminal Procedure Code (1882), section 145—Possession, Order of Criminal Court as to—Parties to proceedings—Right to notice.

Where proceedings under section 145 of the Code of Criminal Procedure were instituted by a Magistrate regarding a dispute as to the right to dig for coal in a certain *mouza* which was claimed by a Company to the exclusion of those in possession of the surface rights of a portion of the *mouza*, and the

* Criminal Revision No. 347 of 1894, against the order passed by N. Warde Jones, Esq., Sub-Divisional Magistrate of Govindpur, dated the 18th May 1894.

1894

BEHARY LALL TRIGUNAIT v. DARBY.

Magistrate made the manager of the Company only a party to the proceedings and not the Company itself, and an order was made under the section in favour of the manager:

Held, that the order was bad and must be set aside as the parties interested were not properly before the Court. The manager had no interest, except as such, or possession except as representing the Company, and such possession is not the kind of possession contemplated by the section (1).

(1) Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1893 *August* 29.

NEWAZ ALI (PETITIONER) *vs.* RAM BALLABH CHAKRAVARTI (OPPOSITE PARTY).*

THE facts which gave rise to these proceedings were shortly as follows:—

Certain property, the subject-matter of the dispute, which then belonged to one Idu, was sold in 1295, at an auction sale, and then purchased by one Siddik Mia *benami* for one Hossein Ali. Hossein Ali was dead at the time of these proceedings, and was represented by Izatunnissa Bibee and her children. In 1297, the property was again sold in execution of a mortgage decree, and it was then bought by Newaz Ali, who was a *naib* in the employment of the lady, and it was alleged as against him that he was a mere *benamidar* for her. Ram Ballabh Chakravarti, it appeared, was at the time these proceedings were instituted a *kurpurdaz* in her employ, and himself had no claim to or interest in the property. In 1299, a quarrel took place between the lady and Newaz Ali, and subsequently thereto the latter applied to the Civil Court, and obtained an order for possession by virtue of his purchase, and obtained symbolical possession. Thereafter on his going to take actual possession he was resisted by Ram Ballabh Chakravarti and others on the side of the lady, and a riot ensued. The police thereupon reported the matter to the Magistrate, who instituted these proceedings under section 145 of the Code of Criminal Procedure, making Ram Ballabh Chakravarti (who was therein described as the *kurpurdaz* of the lady), the first party, and Newaz Ali, the second party. The Magistrate decided that Hossein Ali and his descendants had been in continual possession of the land in dispute, and that the purchase by Newaz Ali was *benami* for them, and after going into the question as to whether the latter could avail himself of his symbolical possession, and deciding that against him, made an order that the first party should be maintained in possession till ousted by due course of law.

Newaz Ali then obtained a rule from the High Court, calling on Ram Ballabh Chakravarti to show cause why the order should not be set aside upon amongst other grounds that the proceedings were bad *ab initio*, as he had no interest in the property, being merely a servant, and that the proper parties were never before the Court.

* Criminal Revision No. 501 of 1893, against the order passed W. H. Vincent, Esq., District Magistrate of Beerbhoom, dated the 12th of July 1893.

THE petitioner in this case and his co-sharers alleged that they were the owners in *lakheraj* right and in exclusive possession of a piece of land known as Purniata in *mouza* Malikara in *pargana* Katras in the district of Manbhoom. Mr. Darby was the manager of the Jheria and Katras Coal Company, who held leases of the sub-soil rights under one Purno Chunder Daw who was a lessee of Rajah Gunga Narain Singh of Katras.

It appeared that the Company claimed as lessees to be entitled to all sub-soil rights in respect of the whole *mouza*, whereas the petitioners denied that the Rajah, or any one claiming under him, had any right whatever in their *lakheraj* lands. The petitioner having started digging for coal in that land was stopped by people in the employ of Mr. Darby, and a breach of the peace being apprehended, the matter was reported to the Sub-Divisional Magistrate by the Sub-Inspector. These proceedings were thereupon instituted under section 145 of the Code of Criminal Procedure, in which Behary Lall Trigunait was made the first party and Mr. Darby the second party. In these proceedings evidence was gone into before the Magistrate who delivered the following judgment :—

"The facts which gave rise to these proceedings are briefly these : One of the parties Behary Lall Trigunait started digging for coal in village Malikara, in *pargana* Katras, when he was

Babu *Dwarka Nath Chuckerbutty* for the petitioner.

Mr. *P. L. Roy* and Moulvi *Serajul Islam* for the opposite party.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.), was as follows :—

In this case there can be no doubt that the proceedings are bad *ab initio*. The proceedings were instituted against Ram Ballabh Chakravarti, who happens to be the *kurpurdaz* of a Mahomedan lady and her children. We find that this Ram Ballabh was a party to the proceedings, and that the lady and her children were never made parties in any sense. But the dispute was really not between Ram Ballabh and the other side, but between this lady and her children on the one side and Newaz Ali on the other. We think that the original proceedings were bad and should be wholly set aside. If there is a dispute between this lady and the other side, and it is one likely to lead to a breach of the peace, fresh proceedings may be instituted in a legal way.

H. T. H.

Rule made absolute and order set aside.

1894

BEHARY LALL TRIGUNAIT v. DARBY.

stopped by people in the employ of Mr. Darby, the manager employed by Messrs. Andrew Yule & Co. to work their coal fields in this district. A breach of the peace was apprehended, and the matter was reported for orders by the Sub-Inspector of Topchachi. Evidence on both sides has been gone into, and I have personally visited the scene, and have had Behary Trigunait to point out to me the old coal pits, which he alleges he dug. He has not been able, however, to show me the vestige of a pit. He tries to explain this by saying that the rains have filled them up: but he apparently forgets that the rains ended long before Magh last, when one of the pits is said to have been dug. There has been no rain since Magh, and the excuse is, therefore, impotent. Moreover the spots pointed out to me are in the bed of a streamlet, and even if one of them had been silted up by the stream in the rains, there would, at least, have been a hollow to mark the spot, or, at all events, a free deposit of sand. As a matter of fact, however, there is no hollow, no sand and not even the colour of coal; while, on the other hand, the outcrop which exhibits itself betrays that the coal is of extremely bad quality and too scant to work. In fact, there is no doubt that these old pits are nothing more than the product of an inventive imagination. A great deal has been said in argument about superficial possession, but the pleaders on both sides appear to have lost sight of the fact that the dispute is not about the surface but about the coal below. What I have to consider is the fact of possession of the coal. Now, it is not denied that Mr. Darby sunk inclines and extracted coal in January last, and those pits are visible and prominent now; on the other hand, I have already remarked that Behary Trigunait has failed to show me even a trace of any pit or incline made by him. The evidence adduced by him is wholly false, and its fictitious nature is exhibited by the fact that even the position of the alleged pits has been wrongly given by the witness. The places shewn me by the Trigunait are, as I have already remarked, in the bed of a streamlet; even positions are wrongly given. That Behary Trigunait has never taken possession of the sub-soil rights is beyond doubt; on the other hand the Rajah's enjoyment of the coaling rights is placed beyond doubt by the documents

filed, and Mr. Darby's possession of the coal is open to ocular demonstration. With rights I have nothing to do; but that Mr. Darby is in possession of the coal is manifest. I accordingly award possession of the coal in *mouza* Malikara to Mr. Darby and order Behary Lall Trigunait to refrain from touching or entering upon it until he shall have ousted Mr. Darby by law."

The petitioner then obtained a rule from the High Court on the opposite party to show cause why this order should not be set aside on the following grounds amongst others :—

That the Katras and Jheria Coal Co., the alleged lessees of the sub-soil rights in the *mouza*, not being made parties to the proceedings, and Mr. Darby, who was only the manager, having no personal interest in the matter, the proceedings were wholly void, and that underground or sub-soil rights could not rightly be the subject of proceedings under the section.

Numerous other objections were taken to the findings of the Magistrate, but it is not material to notice them for the purpose of this report.

Mr. *M. Ghose* and *Mr. J. G. Apcar* appeared in support of the rule.

Mr. *G. S. Henderson* showed cause.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was as follows :—

We think that this rule must be made absolute, and that it is enough for us to say that it must be made absolute, because the persons interested are not before the Court. Mr. Darby, in whose favour this order has been made, in his written statement, states that the property in question belongs to a Coal Company, and that his position is that of a manager of the Company. He does not state that he has any interest except as manager, and does not state that he has any independent, or in fact any, possession, except as representing the Company on whose behalf he is managing the mine. We do not think that that kind of possession is a possession such as is contemplated by this section, or, as I said just now, that the parties interested are properly before us. For these reasons we make the rule absolute.

Rule made absolute and order set aside.

H. T. H.

Before Sir William Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

1894
May 29.

HARI KISHORE MITRA AND OTHERS (PETITIONERS) *v.* ABDUL BAKI MIAH (OPPOSITE PARTY.)*

Transfer of Criminal Case—Ground for Transfer—Probability of unfair trial—Complexity of case—Transfer from one Magistrate to another—Local enquiry—Magistrate collecting evidence on local enquiry—Magistrate trying case, Competency of, to be witness—Competent witness—Examination of Magistrate trying case as a witness.

Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity arising out of disputed boundaries to land in which the accused were charged with rioting, trespass, mischief and theft, and where, in the course of such investigation, he held a local enquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which, by reason of the way it was acquired, he could not properly or legally consider in arriving at an ultimate decision of the case, (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercising judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record, and the Assistant Magistrate tender himself while trying the case as a witness to be cross-examined by either the prosecution or the defence:

Held, that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case, but that it must be transferred to some other Magistrate exercising first class powers for disposal.

Powers of Magistrates to hold local investigations and the nature of such investigations discussed.

Whenever it is desirable for a Magistrate to view the place at which an occurrence, the subject-matter of a judicial investigation before him, has taken place, he should be careful to confine himself to such a view of the place as to enable him to understand the evidence placed before him, and should take care that no information reaches him with reference to the occurrence which he has to investigate beyond what he acquires by that view, and if the place of the occurrence be in dispute he would be wise in postponing his visit till all the evidence has been recorded, if under such circumstances he feels disposed to visit it at all.

* Criminal Rule No. 13 of 1894, against the order passed by C. A. Radice, Esq., Assistant Magistrate of Mymensingh, dated the 5th April 1894.

But where a local enquiry by a Magistrate takes the form of an investigation into the occurrence on the site of the occurrence instead of in his own court, and he takes evidence on the spot, such evidence should not be recorded unless it is protected by all the safeguards by which evidence, on which a Judge may act, is protected by law.

THIS was a rule to show cause why a case pending before the Assistant Magistrate of Mymensingh, who exercised second class powers, should not be transferred to the file of some other Magistrate exercising first class powers on the ground of the complexity of the case. The facts which gave rise to the application being made to the High Court were as follows: It appeared that for a considerable period there had been a dispute existing between Rani Hemanta Kumari Devi and the Maharajah of Nattore and their respective predecessors in title regarding the boundaries of their lands and of certain forests in the sub-division of Tangail adjoining each other, and that these disputes had from time to time led to the institution of criminal proceedings.

In February and March 1893 timber in both forests appeared to have been cut, and thereafter various complaints were made. On the 27th November 1893 the complaint which gave rise to the present proceedings was made by Abdul Baki Miah, a servant of the Maharajah, before Babu Shib Chunder Nag, Sub-Divisional Magistrate of Tangail, charging Hari Kishore Mitra, and a large number of others in the service of the Rani, with offences under sections 147, 379, 426 and 447 of the Penal Code, *viz.*, rioting, theft, mischief and criminal trespass. On the complaint being made, the complainant was examined on oath, and the Magistrate passed the following order: "There have been disputes going on for some time and cases are pending regarding similar matters and are under enquiry. There are questions of right of of all sorts connected with the disputes. Complainant to prove his case first on the 9th December 1893."

On the 11th December 1893, Abdul Baki Miah presented a petition to Mr. Earle, the District Magistrate of Mymensingh, stating, amongst other things, that Babu Shib Chunder Nag was inclined to view all cases instituted by the Maharajah's men in the light of merely contested civil cases, and that it was desirable

1894

HARI KISHORE MITRA v. ABDUL BAKI MIAH.

and necessary for the ends of justice that the cases should be tried by some other magistrate, and asking for a local enquiry and for the seizure of the timber that might be found on the enquiry, and for the transfer of the case to the file of some other magistrate.

Thereupon Mr. Earle recommended a local enquiry to be held by the Sub-Divisional Magistrate of Tangail himself, and suggested that, pending his arrival at the place of occurrence, the timber might be inspected by the Police Inspector. The Sub-Divisional Magistrate then forwarded the order to the Police Inspector for the necessary steps to be taken, and the latter having made an enquiry on the spot submitted his report on the 29th December 1893.

Previous to the submission of that report, *viz.*, on the 20th December, Babu Shib Chunder Nag made over the case to Munshi Sujab Ali, Sub-Deputy Magistrate of Tangail, for trial, and on the 6th January 1894, the latter official ordered warrants to issue without bail for the arrest of some 21 persons referred to in the petition of complaint on charges under sections 379 and 411 of the Penal Code, and on the same day passed an order directing the Police to seize the timber and stack it in the compound at the Police outpost.

On the 9th January 1894 the Rani's people communicated by telegram with Mr. Earle complaining of the orders of the 6th, and the latter replied that he was enquiring into the matter, and called on Babu Shib Chunder Nag to explain why he could not take up the case himself and to give the reason for the orders framed by the Sub-Deputy Magistrate. Further correspondence then appears to have passed, and on the 17th January Mr. Earle directed the issue of the warrants to be stopped and made over the case to Mr. Radice, an Assistant Magistrate with second class powers.

That order was in the following terms :—

"The issue of warrants in the case in question is hereby prohibited, as also the seizure of timbers. The case, as also another case which I understand is pending as regards the forest timber, is made over to Mr. Radice, Assistant Magistrate, who will take them up *de novo* on the spot. He will have perfect liberty to issue such process and pass such orders as he considers legal after

perusal of all the papers, and also, if he likes, local investigation. The cases are between big zemindars and the value of the property concerned is not small. Further the cases may involve difficult questions which I do not consider the Sub-Deputy Magistrate is the proper person to deal with. If any orders have been passed by the Sub-Deputy Magistrate in the other case, the name of which is not specified, they are to be considered as cancelled. Mr. Radice having a full hand to deal with the case * * * I should have put a first class Magistrate in charge of these cases if it had been possible but I find it is impossible."

On the 21st January Mr. Radice reached the locality, and on the 22nd, 23rd, 24th, 25th and 26th he proceeded to hold a local enquiry at which the accused persons were alleged not to have been present. During that enquiry it appeared that Mr. Radice made a number of notes, the nature of which appears from the judgment of the High Court, and it was alleged on the part of the accused that at the time of holding the enquiry he had shown that he had even then formed an opinion adverse to them.

On the 25th January Mr. Radice passed an order directing the accused to appear before him on the 12th February.

On the 8th February an application was made to Mr. Earle on behalf of the accused, asking that the case should be made over to some Magistrate with first class powers on account of its importance and of the difficult questions that were likely to arise in it, but this application was refused.

On the 13th March the accused were brought up before Mr. Radice, and on that day and the following, and again on the 3rd April, some witnesses were examined on behalf of the prosecution in chief only and two of the accused was examined. On the latter date the further hearing was adjourned till the 18th April, and Mr. Radice intimated that he would again visit the locality on the 15th April.

It further appeared that on the 8th February 1894 an application had been made by the accused for copies of the proceedings, order sheet, notes, memos, and depositions which had been made and recorded by Mr. Radice while holding the local enquiry, and that on the 9th February Mr. Radice had passed the following order: "Grant copies of every thing on the record of the

1894

HARI KISHORE MITRA v. ABDUL BAKI MIAH.

case," and the accused thereafter obtained copies of everything that *had been made* part of the record.

On the 3rd April 1894 a further petition was put in on behalf of the accused, stating that they had obtained copies of the daily proceedings in connection with the local enquiry, which had been made part of the record, and praying that if Mr. Radice had made any separate notes or memoranda which had not been made part of the record, he would be pleased to make such a memoranda part of the record, so that the accused might have an opportunity of seeing them. This petition was presented in Court by Mr. W. C. Ghose on behalf of the accused, and, as stated in the petition of the accused to the High Court, the following is what then transpired :—

"Mr. Ghose said that he did not know whether there was any other note besides the one that formed part of the record, and that if there was any such note he prayed that he might be allowed an inspection of it.

"Mr. Radice said that he thought he had made all notes part of the record, and that he would presently make an enquiry.

[At this stage the Peshkar, on being asked, handed over to Mr. Radice some notes saying that they had not been made part of the record.]

"Mr. Radice then went through the notes himself, and after considering for a few minutes told Mr. Ghose that the part of the notes which contained facts found by him would be made part of the record, but that the remaining portion which contained his opinions he would keep away. Mr. Ghose thereupon said that he was entitled to see the whole of the notes and he prayed that he might be allowed to do so.

"Mr. Radice then said that he had recorded his opinions in preparation for writing his judgment. Mr. Ghose answered, saying, that surely at that stage the Court ought not to have formed any opinion, and he prayed that he might be allowed to see the whole of the notes.

"Mr. Radice thereupon said that he might change his opinion. Mr. Ghose then again prayed that he might be allowed to see the whole of the notes. That thereupon the said Mr. Radice, without allowing the said Mr. Ghose to see the notes, recorded the

following order on the said petition presented by Mr. Ghose, *viz.*, 'I may put in as much of the notes as is observation of fact and not opinion or inference drawn by me; but must in any case consider what I will put in and what not.' "

On the 4th April 1894, another petition was filed on behalf of the accused for certified copies of the notes and memoranda made by Mr. Radice, in addition to those on the record, and also a copy of the petition filed by the defence the day before together with the order passed thereon; and on the 5th April 1894 Mr. Radice passed the following order: "Ask Mr. Ghose to see me about this." Mr. Ghose appeared to have seen Mr. Radice on the same day in Chambers and verbally prayed that copies of the whole of his notes might be granted, but did not succeed in his prayer; and the following further order was then passed on the petition the same day: "Grant copy of petition. As to copies of my notes I will pass orders on the 16th. Put up them."

On the 13th April 1894 this application was made to the High Court. It was alleged that under the circumstances it would be necessary to call Mr. Radice as a witness for the defence, and affidavits were put in to show that he had not only formed an opinion adverse to the accused, but had recorded such adverse opinion in the notes referred to with a view to base his judgment thereon, and that consequently a fair and impartial trial could not be expected from him. It was further urged as a ground for a transfer that what Mr. Radice had done was in fact to take part in collecting evidence for the prosecution during the local enquiry, and therefore he ought not to try the case, and also that the case was one of such complexity that it should be tried by a Magistrate exercising first class powers.

A rule was issued on the latter ground, and Mr. Radice submitted an explanation and sent up the notes referred to. The purport of that explanation and the nature of the contents of the notes appear sufficiently from the judgment of the High Court.

Mr. *Jackson* and Babu *Promotho Nath Sein* appeared in support of the rule.

Mr. *W. C. Bonnerjee*, Babu *Srish Chunder Chowdhry*, and Mr. *K. N. Chowdhry* showed cause.

1894

HARI KISHORE MITRA v. ABDUL BAKI MIAH.

The following judgments were delivered by the High Court (PETHERAM, C.J., and RAMPINI, J.) :—

PETHERAM, C.J.—The Maharajah of Nattore and Rani Hemanta Kumari Devi are the owners of forests in the Sub-Division of Tangail, which adjoin each other, and there have been for a long time disputes between them, and the persons who claim under them, as to the boundary line between their properties, which have from time to time led to the institution of criminal proceedings. On the 27th November 1893, Abdul Baki Miah, a servant of the Maharajah, laid a complaint before Babu Shib Chunder Nag, Sub-Divisional Magistrate of Tangail, charging the petitioners, who are tenants and servants of the Rani, with having, on the 25th and 26th of the same month, been guilty of the offences of rioting, criminal trespass, mischief and theft. The complainant was examined on oath before the Sub-Divisional Magistrate, who on the same day made an order that there were questions of right of all sorts connected with the disputes, and that the complainant should prove his case first on the 9th of December. On the 11th of December the complainant petitioned the District Magistrate to remove the case from the file of Babu Shib Chunder Nag to that of some other Magistrate, on the ground that that officer was inclined to view all cases instituted by the Maharajah's men in the light of contested civil cases; and on the 17th of January 1894 the District Magistrate, after a good deal of correspondence and consideration, made over the case to Mr. Radice, an Assistant Magistrate, with orders that he should commence the trial *de novo* and on the spot. Mr. Radice reached the place on the 21st of January, and was engaged on the 22nd, 23rd, 24th, 25th and 26th on a local enquiry, in the course of which he made a good many notes. He has sent these notes to this Court under cover, and they indicate that he made on those days a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay them before some tribunal, but the information which he sought and obtained was not guarded by the safeguards by which statements on which a Judge or Magistrate exercising judicial functions can act must be guarded. On the 13th of March the accused persons were brought

up before Mr. Radice, and on that and the next day, and again on the 3rd of April, to which day the trial seems to have been adjourned, witnesses were examined for the prosecution, and two of the accused were examined by the Magistrate. The enquiry was then adjourned to the 18th, and Mr. Radice intimated that he would again visit the place on the 15th. On the 3rd an application was made to Mr. Radice on behalf of the accused, that all notes and memoranda which he had made in the course of the investigation might be made part of the record, and that the parties might have copies of them. A good deal of discussion took place on the subject, and on the 5th Mr. Radice made this order: "Grant copy of petition. As to copies of my notes I will pass orders on the 16th. Put up them." On the 13th this rule was obtained from this Court, at the instance of the accused, to transfer the case from the file of the Assistant Magistrate to that of a Magistrate exercising first class powers, on the ground of the complexity of the case.

Mr. Radice has submitted an explanation to this Court, in which he tells us, amongst other things, that a transfer of the case from his file would cause great waste of time, and submits that a transfer is not necessary. With reference to the local enquiry he says: "Mr. Earle, the Magistrate, refused to transfer this case from my file (I was then Assistant Magistrate with second class powers) to that of a Magistrate with first class powers. I had consulted Mr. Earle on the advisability of transfering this case from my file, on the ground of my having conducted the local enquiry, and that either side might desire to call me as a witness. It was decided that as I had prepared full and careful notes of everything done at the local enquiry it would be sufficient if I were to put in these notes as evidence, and invite both parties to cross-examine me thereon." I have looked at some of the evidence which has been taken in the case, and I must say that if such an amount of evidence and such an elaborate local enquiry was necessary to determine whether the timber was grown on the land of the Maharajah or on that of the Rani, it seems unfortunate that the District Magistrate should have removed the case from the file of Babu Shib Chunder Nag for the reason assigned, as if it is the case that the question between the zemindars is one of such complication and difficulty,

1894

HARI KISHORE MITRA v. ABDUL BARI MIAH.

it could hardly be possible to convict the servants of either of them of crime, for taking, by the orders of his master, timber which his master claimed as his own ; and at first I was disposed to discharge this rule, on the ground that the local enquiry was not necessary at all, and that it would be enough for us to send the case back to Mr. Radice, with a direction to try the question whether crime had been committed, and not to endeavour in such a case to decide questions of title or boundary. On further consideration, however, I have come to the conclusion that we cannot allow Mr. Radice to proceed further with the trial of this case, and I have been forced to that conclusion mainly by what he has himself said in his explanation to this Court. Mr. Radice evidently considers the local investigation to have been of the greatest importance, and he feels, and no doubt properly, that he is not in a position to act judicially upon the information which he obtained in the course of it ; but he thinks, after consultation with the District Magistrate, that the difficulty caused by the mode in which the local enquiry was conducted may be avoided by his puttnig in his notes as evidence, and by his allowing either the prosecution or the defence to cross-examine him upon them. It is in my opinion absolutely impossible for us to countenance anything of the kind. Such a proceeding is not contemplated by any provision to be found in the written law of this country, and is one which I think must have a tendency to shake the confidence of the people in the administration of justice. It may be that there are cases in which it is desirable that a judicial officer should see the place in which an occurrence which is the subject of a judicial investigation before him has taken place, in order to enable him to understand the evidence which is laid before him, but when an officer visits a place for this purpose he should take care that no information reaches him with reference to the occurrence which he is to investigate beyond what he acquires from the view of the place, and when there is a dispute as to the exact spot in which the occurrence is said to have taken place, he will be wise to defer his visit to the spot until he has heard the whole of the evidence, if under such circumstances he feels disposed to visit it at all. There may also be another kind of local enquiry which an officer may sometimes be called upon to hold.

I mean an enquiry which, for the sake of convenience, he holds at the place where the occurrence took place, and not in his own Court; but such an enquiry, wherever it is held, is the trial of the case, and no evidence can be received at it, unless it is protected by all the safeguards by which evidence on which a Judge may act is protected by law. It is evident that the local enquiry held by Mr. Radice in this case was something very different from either of these, and was one in which he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, which, by reason of the mode in which he had acquired it, he cannot properly and legally consider in arriving at his ultimate decision. I do not believe it would be possible for any man in coming to a conclusion of fact under such circumstances, to separate the evidence which was properly before him from the information he had acquired on the spot, so that he could say that his mind was not influenced by such information, and when the officer tells us, as he does here, that he has acquired such information, I think it is impossible for us to allow him to proceed with the trial. I wish to add that though Mr. Radice has fallen into this error with reference to the nature of a local inquiry when held by a judicial officer in the course of a judicial enquiry, his notes of the local enquiry and of the evidence taken before him indicate to my mind a conscientious desire on his part to spare himself no trouble, but to make the investigation entrusted to him as complete and at the same time as fair as possible.

The rule will be made absolute to remove the case from his file to that of some Magistrate of the first class, but the selection of the particular officer must rest with the District Magistrate.

RAMPINI, J.—I agree with the learned Chief Justice that this rule must, for the reasons assigned by him, be made absolute. I further agree with him in considering that the Assistant Magistrate who entered on the local enquiry made by him only under the orders of his superior officer, the District Magistrate, has throughout acted conscientiously and exhibited an anxious desire to deal fairly with both parties to this litigation. But the fact of his having made the local enquiry he did make, in which

1894

MAHI KISHORE MITRA v. ABDUL BAKI MIAH.

he collected information with regard to the boundary between the Maharajah's and the Rani's properties and the cutting of the logs, and in which he actually searched for and found some of the logs claimed as stolen property, renders it impossible for him to try this case judicially. The suggestion which he makes after consultation with the District Magistrate that he should enter the witness-box and be examined and cross-examined by the pleaders of the parties is one which it is impossible, and which it would be illegal, for him to carry out. It has been frequently ruled by this Court that when a Judge is the sole judge, both of law and fact, he cannot give evidence before himself [see *Empress* v. *Donnelly* (1).] Further I may point out that there is no section of the Criminal Procedure Code which authorises a Magistrate to make such a local investigation into a case tried by himself as was made by the Assistant Magistrate in this case. Section 148 provides that the District Magistrate or Sub-Divisional Magistrate may direct some other Magistrate, subordinate to him, to make a local enquiry in a case of a dispute likely to cause a breach of the peace regarding tangible immoveable property, and that the report of such Magistrate may be read as evidence in the case. Section 202 authorises a Magistrate when, after examining a complainant, he sees reason to distrust the truth of the complaint to postpone issuing process against the accused, and either to enquire into the case himself, or direct a previous local investigation to be made by any officer subordinate to him, or by a police officer, or by such other person, not being a Magistrate or police officer, as he sees fit. Section 293 directs that in the course of a sessions trial, when it is considered desirable that the jury or assessors should view the place where the offence is alleged to have been committed, they may be conducted to the place under the care of an officer of the Court, and when the view is finished they must immediately be conducted back into Court, without being allowed to speak to anyone. These are the only sections of the Criminal Procedure Code which allow of local investigations and local inspections, and it is clear that the sort of local enquiry made by the Assistant Magistrate in this case was not one contemplated or

(1) I. L. R., 2 Calc., 405.

authorised by any of them. It is very desirable, I think, that Magistrates should bear these sections in mind when pressed, as they constantly are, to make local investigations into cases coming judicially before them.

1894

HARI KISHORE MITRA v. ABDUL BAKI MIAH.

H. T. H. *Rule made absolute.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

RAM BRAHMA SIRCAR AND OTHERS (PETITIONERS) *v.* CHANDRA KANTA SHAH (OPPOSITE-PARTY.)*

1894 *June* 11.

Revision—Criminal Cases—Power of High Court in Revisional Cases—Power to go into case on facts—Criminal Procedure Code (Act X of 1882), section 439.

Under section 439 of the Code of Criminal Procedure, 1882, the High Court has power to consider the facts of a case in revision.

THE petitioners in this case were charged before the Sub-Divisional Magistrate of Meherpore with offences under sections 147, 379, and 109 of the Penal Code, and were all convicted, Ram Brahma Sircar being sentenced to six months and the others to five months rigorous imprisonment. Against this conviction there was an appeal to the District Magistrate who altered the conviction to one under sections 143 and 379 but upheld the sentence.

The petitioners then moved the High Court under the revisional section to send for the record and quash the convictions on the following grounds :—

(1) That under the circumstances of the case the petitioners were not members of an unlawful assembly, and therefore not guilty under section 143 ;

(2) That there was nothing in the case to show any common object ;

(3) That there was nothing in the facts proved to show that theft had been committed ; and

(4) That upon the facts proved, and under the circumstances of the case, the sentences passed were unduly severe.

* Criminal Revision No. 273 of 1894, against the order passed by J. H. E. Garrett, Esq., District Magistrate of Nuddia, dated the 14th May 1894, modifying the order passed by W. N. Delevinge, Esq., Sub-Divisional Magistrate of Meherpore, dated the 21st of April 1894.

1894

RAM BRAHMA SIRCAR v. CHANDRA KANTA SHAH.

The facts of the case are fully stated in the judgment of the High Court. The only questions argued at the hearing of the rule were that the facts disclosed no intention on the part of the accused to do anything unlawful; that there was no evidence of any theft or common object, and that the conviction under neither section could therefore be maintained.

Mr. *M. Ghose* and Babu *Haraprosad Chatterjee* for the petitioners.

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was as follows :—

The accused in this case have been convicted under the provisions of sections 143 and 379 of the Penal Code and sentenced, the principal accused, Ram Brahma Sircar, to six months, and the remaining six accused to five months rigorous imprisonment.

The facts of the case are as follows :—The complainant Chandra Kanta Shah is a trader, and on the 12th March last he wished to send certain bags of linseed from Boalia, where he lived, to Calcutta. He engaged some carts to convey his bags, and on the morning of the day of the occurrence he sent twenty bags of linseed across the river, on the west bank of which he resided, to the east bank, where the carts, which were to convey his goods and those of another trader, were collected. The complainant says that on the evening of the day before the occurrence "the *naib's* master, Mani Babu (that is, the master of the principal accused Ram Brahma Sircar) had demanded a larger *nazar* than Rs. 2 from us. Rs. 2 had been taken, but the *naib* had said he would levy Rs. 2 from every shopkeeper in the bazar. I would not pay the two rupees, and in the evening of that day he sent some men to take me to *cutcherry*. This was the day before the day of the occurrence." On the following morning, according to the complainant, after his twenty sacks of linseed had been taken across the river, Ali Sheikh, a *barkandaz*, and one of the accused, came from Ram Brahma's *cutcherry* to the east bank and then went away. He then came back and called the ferryman Madhu Patni and two of the cartmen, who had been assisting the coolies

in loading the carts, to the accused's *arat* which is on the west bank of the river. The complainant followed them there, upon which the accused Ram Brahma said to the ferryman, "you must not take the goods of Chandra Shah and Godadhar Shah across the river," and to the cartmen, "you must not bring your carts on my land, take them away and be off." The ferryman then said he would not take any more of the complainant's bags of linseed across the river. The *naib* Ram Brahma and two others then went to the *ghat*, crossed in the ferryboat to the east side, and told the *barkandaz* Ali Sheikh, to take the carts, which were loaded with the complainant's bags of linseed, to the *cutcherry*, which, according to the witness Umed Sheikh, is on the east side of the river. On Ram Brahma's ordering the carts to be taken to the *cutcherry*, Ali *barkundaz* said, "I cannot take them alone." The *naib* then said, "bring the *barkandazes* and *halsanas* from the *cutcherry*." Ali Sheikh accordingly went to the *cutcherry*, and returned with the other accused and others, about five or seven in number, and took away all the carts that were there in spite of the remonstrances of the cartmen. Subsequently the complainant complained at the *thannah*, and the Sub-Inspector of Police came and found fourteen carts near the *cutcherry*. They were, he says, "not at the place where carts usually stand on the side of the *ghat*," but they were on or near the road leading to Alumdanga. Some nine sacks of linseed were found on the carts, and some 61 sacks were found on the *west* bank of the river. The complainant admits that he recovered these nine sacks of linseed found by the Sub-Inspector. He does not say explicitly whether or not he got back the remaining thirteen sacks out of the twenty that had been taken to the east bank, but the cartman Umed Sheikh says that "the sacks taken away with the carts have not been recovered."

Now, on these facts the Assistant Magistrate convicted the accused of theft and rioting. The District Magistrate on appeal affirmed the conviction under section 379, but altered the conviction of rioting into one of unlawful assembly under section 143.

Mr. Ghose, on behalf of the appellants, has argued that the conviction under neither section can be sustained, inasmuch as

1894

RAM BRAHMA SIRCAR v. CHANDRA KANTA SHAH.

the accused had no intention of taking possession of the bags of linseed, or of doing anything unlawful. They merely desired, he contends, to remove the carts from the land of the accused's master, where they were being loaded without his permission.

We have examined the evidence in this case with care, and on the whole we do not think that there is sufficient evidence to shew that the accused wished to take the goods of the complainant out of his possession and into their own. There is no evidence to show that they have had anything to do with the disappearance of the bags of linseed which have not been recovered. The fact that the Sub-Inspector of Police found nine bags of linseed still loaded on the carts shows that the accused had no wish to retain possession of these bags. We think we may therefore acquit them of the offence of theft, of which they have been convicted; but we think the conviction of the offence of unlawful assembly should be sustained. The accused clearly assembled to prevent the complainant and his cartmen doing what they were legally entitled to do, *viz*, to take the carts of linseed along the road to Alumdanga and Calcutta. Mr. Ghose has told us that this road is a public one. Why they acted in this way is not so apparent. It may be inferred that they did so because the complainant had not paid the extra Rs. 2 which had been demanded from him the previous evening. However this may be, after his goods had been taken across the ferry and loaded on the carts on the east bank, the accused had no right to stop the carts from going along the public road for any reason, and the accused, when they assembled armed with *lathies* (as according to the witness Banko Behari they were) and seized and moved the carts as they did, had undoubtedly a common object of an unlawful nature. We therefore think the conviction under section 143 of the Penal Code must be sustained.

We, however, consider that the sentence passed in this case is unduly and unnecessarily severe, and would have been so, even if the accused had been properly convicted of theft. We are told the accused have undergone about sixteen days rigorous imprisonment. We think this is sufficient for the requirements of justice in this case, and we will reduce the sentence accordingly.

We must, before concluding, allude to an observation made by

1894

RAM BRAHMA SIRCAR v. CHANDRA KANTA SHAH.

the District Magistrate in his letter of explanation with regard to this case. He has said that this Court in revision has only to determine questions of law and has no jurisdiction to determine questions of fact. He cites a case [*In the matter of the petition of Debi Churn Biswas* (1)] in support of this observation. This case, however, was decided under the old Criminal Procedure Code, Act X of 1872, the provisions of sections 294 and 297 of which were different from those of section 439 of the present Code. The powers of this Court to consider the facts of a case in revision are apparent from the terms of the section, and this has been held in numerous decisions of this Court. We may cite the passage at p. 618 of the case of *Hari Dass Sanyal* v. *Saritulla* (2) as explicitly dealing with this question.

For these reasons, then, we set aside the conviction of the accused under section 379 of the Penal Code. We affirm their conviction under section 143, and we reduce the sentence of imprisonment passed on them to such period as they may have already undergone.

Rule made absolute in part and conviction modified.

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

IRSHAD ALI CHOWDHRY (OPPOSITE-PARTY) *v.* KANTA PERSHAD HAZAREE (PETITIONER.)*

1894 *June* 27.

Second appeal—Bengal Tenancy Act (VIII of 1885), ss. 106, 108—Special Judge, Order of—Boundary dispute—Bengal Survey Act (Bengal Act V of 1875), Part V, s. 40—Settlement Officer acting as Survey Officer.

A second appeal only lies to the High Court under section 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under section 106 of the Act. No second appeal, therefore, lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by

* Appeal from Appellate Decree No. 721 of 1893 against the decree of C. P. Caspersz, Esq., Special Judge of Chittagong, dated the 19th December 1892, affirming the decree of Babu Durga Churn Ghose, Assistant Settlement Officer of Chittagong, dated the 31st of August 1892.

(1) 20 W. R. Cr., 40. (2) I. L. R., 15 Calc., 608.

1894

IRSHAD ALI CHOWDHRY v. KANTA PERSHAD HAZAREE.

a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (Bengal Act V of 1875).

The Court declined to interfere under section 622 of the Civil Procedure Code, being of opinion that the Settlement Officer had power under section 189 (*b*) of the Bengal Tenancy Act, and Rule 1, chapter VI of the Government rules under the Tenancy Act to act as he had done, and that therefore in holding that no appeal lay to him the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised.

THE proceeding which gave rise to this appeal was a petition headed "Case of boundary dispute No. 5 of 1892-93," and filed in the Court of the Settlement Officer of Chittagong by Kanta Pershad Hazaree for a determination of the boundary between his estate in *mouza* Burmacharn and *mouza* Toiladip. Notice of the application was served on Irshad Ali Chowdhry, who was in possession of *taluk* Jinnat Ali Khan (which was the portion of *mouza* Toiladip contiguous to the land of Kanta Pershad Hazaree) as auction-purchaser at a sale for arrears of revenue held in March 1888.

Irshad Ali Chowdhry made a number of objections to the petition, of which the following only are material to this report, namely, that the case being one for determination of boundaries had not been brought in the proper Court; that in such a case he should not have been made a party; that the Survey Superintendent and Settlement Officers had already determined the boundaries of his (the objector's) land, and the record of rights had been effected thereon, and the Court was therefore not competent to deal with the matter again; that as the case had not been brought under section 106 of the Bengal Tenancy Act it ought not to be heard by the Court; and that the petitioner had no right to the land claimed by him.

The case came before the Assistant Settlement Officer of Chittagong, who, finding that the boundary had been already settled in a former proceeding between Arsad Ali Khan, the former proprietor of *taluk* Jinnat Ali Khan, and the petitioner Kanta Pershad Hazaree, by the Judge of Chittagong, on the 7th July 1884, and that nothing new had been made out in the present case to justify the adoption of a different boundary, decided the case in favour of the petitioner.

On a petition of appeal to the Settlement Officer the case was

referred to the Assistant Settlement Officer for report "whether it was a summary decision of an objection, or a judgment in a regular dispute case under section 106 of the Bengal Tenancy Act," on which the Assistant Settlement Officer made the following order, dated 23rd September 1892 :—

"This is not a dispute raised under section 106 of the Bengal Tenancy Act, but one for laying down the boundary between the two *mehals* named above, and which had already been determined by Courts of competent jurisdiction. It was entered in the register of boundary disputes kept under Part V. of the Bengal Survey Act, and the procedure followed in its disposal was that prescribed by that Act."

The objector Irshad Ali Chowdhry appealed to the Special Judge of Chittagong, before whom an objection was taken that no appeal lay. As to to this the Judge said :—

"A preliminary objection has been made to the effect that no appeal lies to this Court, sitting as a Special Judge under Chapter X of the Bengal Tenancy Act. It is admitted and proved that appellant's appeal to the Settlement Officer, who is the Superintendent of Survey under Bengal Act V of 1875, has been duly dismissed. Section 59 (*c*) of the Survey Act provides for appeals from decisions in boundary disputes ; and section 62 provides for a civil suit to be thereafter instituted. Clearly this Court has no jurisdiction ; nor does the decision of the Assistant Settlement Officer, who mistakenly designates himself as such, purport to be under the Tenancy Act. It is specially headed 'boundary dispute.' No doubt there has been a transference of plots, but that was for the information of the Survey Department, and correction of the maps. I am referred to the Settlement Manual, page 8, Chapter II., paragraph 19. But section 108, Act VIII of 1885, allows appeals from the decisions of Revenue Officers under Chapter X of that Act, and not under the Survey Act. Appellant himself has recognized the fact by going up to the superior authorities in the Survey Department. I express no opinion upon the question whether the proceedings ought to have been regulated by the Bengal Tenancy Act. They were not so regulated, and I therefore give my judgment for respondent with costs. The appeal is dismissed. I allow no costs to the Secretary of State, as he was no party to the appeal, and the Government pleader contented himself with observing that no appeal lay."

From this decision Irshad Ali Chowdhry appealed to the High Court, mainly on the grounds that the Special Judge was wrong in holding that the case was one under Bengal Act V of 1875, and that therefore no appeal lay to him ; that the application having been made in the course of proceedings

1894

IRSHAD ALI CHOWDHRY v. KANTA PERSHAD HAZAREE.

under the Bengal Tenancy Act disputing the correctness of the boundary laid down in respect of his farming lease, and having been entertained by him as a Settlement Officer, and not as Assistant Superintendent of Survey, the Judge should have held that an appeal lay from the decision of the Settlement Officer under Chapter X of the Bengal Tenancy Act ; that the Judge should have held that the first Court did not act as Assistant Superintendent of Survey, nor was he authorized to entertain the application under that Act.

Sir *Griffith Evans*, and Babu *Harendro Narain Mitter* (for Babu *Akhil Chunder Sen*) for the appellant.

Moulvie *Serajul Islam* for the respondent.

The objection was taken that no second appeal lay to the High Court.

The judgment of the Court (HILL and RAMPINI, JJ.) was as follows :—

This is a second appeal against an order of the Special Judge of Chittagong, who has rejected an appeal against an order of the Assistant Settlement Officer of Chittagong on the ground that no appeal lies to him. On behalf of the appellant it is contended that the order of the Assistant Settlement Officer was passed under the provisions of the Bengal Tenancy Act, that it was *ultra vires*, being a decision as to a boundary dispute between neighbouring proprietors of land, and that, therefore, it should have been set aside by the Special Judge.

A preliminary objection to the hearing of this second appeal has been urged on the ground that no appeal lies to this Court. We are of opinion that this contention must prevail. A second appeal only lies to this Court under section 108 (3) against a decision of the Special Judge in a case under section 106, and it is clear that the decision of the Special Judge in this case, which it is sought to set aside, is not a decision under section 106, because it is not a decision about the correctness of an entry in the record of rights.

Then it is said that we should regard this appeal as an application under section 622 of the Civil Procedure Code. But we are unable to do so, because we do not think that the Special Judge

has refrained from exercising any jurisdiction which he ought to have exercised. The Settlement Officer's order, which the Special Judge declined to interfere with, was, we think, passed by him under his powers as a Survey Officer with which he is vested under section 189 (*b*) and Rule 1, Chapter VI of the Government Rules made under the Tenancy Act. He himself says in an order, dated 23rd September 1892, which is to be found on the record that his order is one under Part V of the Bengal Survey Act (Bengal Act V of 1875), and section 40 of that Act, which is the first section of Part V, authorises him to dispose of such a boundary dispute as he has decided in this case. We, therefore, do not think that he was dealing with the case under the Tenancy Act, and accordingly the decision of the Special Judge now appealed against is right.

Sir Griffith Evans relies on the fact that the Settlement Officer has described himself as such and not as a Survey Officer, and also on Rule 33, page 8 of the Board's Survey Manual, in which it is laid down that, under section 106, a Settlement Officer may decide disputes between two disputing landlords, unless the estates of one of them should lie without the limits of the area under settlement, which is not the case, it is said, in the present instance.

But this rule has not the force of law, and the Settlement Officer himself says his proceeding was one under Part V of the Survey Act. It is a well known rule that, when a judicial officer has powers to do certain things, it is to be presumed that, when he does these things, he was acting under these powers, though he may not expressly say so.

We, therefore, see no reason for interfering in this case. As the Special Judge points out, the appellant has still the remedy of a regular civil suit open to him.

We dismiss the appeal with costs.

Appeal dismissed.

J. V. W.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris, Mr. Justice O'Kinealy, Mr. Justice Trevelyan, and Mr. Justice Ghose.

1894
Augt. 8.

GIRISH CHUNDRA BASU (AUCTION-PURCHASER) PETITIONER *v.* APURBA KRISHNA DASS (JUDGMENT-DEBTOR) AND ANOTHER (DECREE-HOLDER) OPPOSITE PARTIES.*

Civil Procedure Code (1882), section 310A—Act V of 1894, section 2—Construction of Statute—Act creating new rights, Effect of—Execution of Decree—Sale in Execution of Decree held after Act V of 1894 came into operation, the execution proceedings being commenced before—Retrospective enactment when applicable to pending proceedings.

On the 30th January 1894 an application was made for execution of a decree passed on the 5th of the same month and certain property was thereafter duly attached. On the 8th February 1894 the sale proclamation was published, and on the 26th March the sale was held. On the 17th April 1894 the judgment-debtor applied to the Court under the provisions of section 310A of the Code of Civil Procedure (which section was added to the Code by Act V of 1894, and which came into operation on the 2nd March 1894) to have the sale set aside on payment to the auction-purchaser of 5 per cent. on the purchase money and to the decree-holder of the amount mentioned in the sale proclamation. The auction-purchaser resisted the application on the ground that the section could not affect the sale in question.

Held (PETHERAM, C.J., and O'KINEALY, J., *dissenting*) that the section conferred a new and substantive right on the judgment-debtor and was not merely a matter of procedure; and that as Act V of 1894 does not clearly indicate the intention of the Legislature that it was meant to have retrospective effect, the section had no application to pending proceedings, and the judgment-debtor was not entitled to have the sale set aside under its provisions.

Held, per PETHERAM, C.J., and O'KINEALY, J., that the section merely dealt with a matter of procedure and applied to the sale which the judgment-debtor was entitled to have set aside.

Per PETHERAM, C.J.—All that section 310A does, so far as the decree-holder and judgment-debtor are concerned, is to extend the period during which the latter may discharge his liability by 30 days beyond the date of the sale, and is merely a modification of the way in which the successful litigant may obtain the fruits of his decree; and even if it be considered as creating a new and substantive right in the judgment-debtor the words used by the Legislature in Act V of 1894 must be taken to

* Full Bench in Rule No. 860 of 1894.

have been used with the express intention that the section should have a retrospective effect in the sense that it should take effect on sales held after the Act came into operation, though the execution proceedings, of which the sale was a part, had been commenced before the Act came into operation.

Per O'KINEALY, J.—Act XIV of 1882 is on the face of it an Act of procedure and nothing more, and what the Legislature intended to do by Act V of 1894 was to amend the rules of that Code with regard to the sale and delivery of property, and the section, both in form and substance, is merely a rule of procedure under which no party has a vested interest. In addition, as under section 316 of the Code a purchaser has no vested interest in the property before the date of the certificate he could not insist on the sale being confirmed and a certificate being given him if the amount due by the judgment-debtor be paid in before that date.

Lal Mohun Mukerjee v. *Jogendra Chunder Roy* (1), *Tupsee Singh* v. *Ram Sarun Koeri* (2), *Uzir Ali* v. *Ram Komal Shaha* (3), and *Deb Narain Dutt* v. *Narendra Krishna* (4) referred to.

THIS was an application by a purchaser at a sale held in execution of a decree to have an order passed by the Munsif of Alipore annulling the sale set aside.

The decree was passed on the 5th January 1894 for Rs. 36 in a suit by Jogendra Nath Banerjee against Apurba Krishna Dass. On the 30th January 1894 execution was applied for and certain property was thereafter duly attached. On the 8th February 1894 the sale proclamation was duly published and the sale was held on the 26th March. The petitioner before the High Court, Girish Chundra Basu, became the purchaser of the property for Rs. 80, the property being sold subject to a mortgage for Rs. 600 with interest thereon.

On the 2nd March 1894 Act V of 1894 came into operation, and on the 17th April 1894 the judgment-debtor applied under section 310A of the Code of Civil Procedure which was added to the Code by that Act to have the sale set aside upon payment to the purchaser of 5 per cent. on the purchase-money and to the decree-holder of the amount mentioned in the sale proclamation.

The purchaser opposed the application, contending that section 310A could not apply to the sale, which was in execution of a

(1) I. L. R., 14 Calc., 636.
(2) I. L. R., 15 Calc., 376.
(3) I. L. R., 15 Calc., 383.
(4) I. L. R., 16 Calc., 267.

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

decree passed before the Act came into operation. The Munsif, however, held that the amending Act having come into operation at once applied to all pending sales, and overruling the objection made the order asked for.

The auction-purchaser then applied to the High Court for a rule to show cause why that order should not be set aside, on the ground that section 310A had no application to the case, and the Munsif had no jurisdiction to set aside the sale.

The application was made on the 3rd May 1894 by Babu *Ashutosh Mukerjee* to a Bench consisting of PETHERAM, C.J., and RAMPINI, J., and a rule was issued in the form asked for.

The rule was heard before a Full Bench.

Babu *Ashutosh Mukerjee* in support of the rule.

Babu *Issur Chunder Chuckerbutty* showed cause.

Babu *Issur Chunder Chuckerbutty* took the preliminary objection that as there was an appeal from the Munsif's order the High Court should not interfere in its revisional jurisdiction, but the Court decided to hear the case on the merits.

Babu *Ashutosh Mukerjee* in support of the rule.—Upon the principles to be deduced from the three Full Bench decisions in *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1), *Uzir Ali* v. *Ram Komal Shaha* (2), and *Deb Narain Dutt* v. *Narendra Krishna* (3) it cannot be held that Act V of 1894 applies to this sale. The first of these cases arose out of an application made under section 174 of the Bengal Tenancy Act, and it was held that the section created a new substantive right, and could not therefore, in the absence of express legislation, be applied to the case of a sale in execution of a decree the execution of which had been applied for before the Act came into force. In *Uzir Ali's* case the same section of the Bengal Tenancy Act was in question, and the same decision was given, it being held that the section was not a mere matter of procedure, but conferred a substantive right. In *Deb Narain Dutt's* case the question was whether section 170 of the Bengal Tenancy Act applied to a pending proceeding, and it was held that it did apply being a matter of

(1) I. L. R., 14 Calc., 636. (2) I. L. R., 15 Calc., 383.
(3) I. L. R., 16 Calc., 267.

procedure, but the previous decision was referred to. It is clear, therefore, that section 174 conferred a new and substantive right. The statement of objects and reasons to Act V of 1894, (*Gazette of India*, Part V, 11th March 1893, page 60), shows that the Legislature intended to extend the provisions of section 174 to other cases than those covered by the Bengal Tenancy Act, and it makes no difference whether the matter is inserted in the Civil Procedure Code or in the Bengal Tenancy Act. A new right is conferred. You must look at the essence of the enactment and not at the place where it is enacted. It is immaterial in what Act it stands. You must look at the section and see if it confers a new right or merely lays down a new procedure. There are other rights dealt with in the Code of Civil Procedure. Sections 13, 43, and 125 all deal with matters of right. Again, when the Legislature intends an enactment to apply to pending cases it specially enacts that it shall so apply. The Partition Act (IV of 1893) is a Procedure Act, but section 10 provides that it is to apply to pending proceedings. There is no similar provision in Act V of 1894. The section in the Act confers a new right, and being added to a Procedure Code does not make it a mere matter of procedure. If the reverse had been enacted it could not have been contended that a right of the judgment-debtor had not been taken away. In the case of *Anund Chunder Roy* v. *Nitai Bhoomij* (1) it was held that an appeal newly given by law is applicable to proceedings instituted before that change in the procedure was made, the appeal being merely a matter of procedure, so that it is not enough to see where the section is found, but you have to look to what it relates. In *Framji Bomanji* v. *Hormasji Barjorji* (2), the same principle was adopted, though the new Act took away the right of appeal. The objection taken that this Court cannot interfere because an appeal lay from the Munsif's order is of no avail. My client is the purchaser and no party to the suit and could not therefore appeal.

Babu *Issur Chunder Chuckerbutty*.—Under section 244, all questions that arise in execution of a decree can be decided, and in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3) it was

(1) I. L. R., 16 Calc., 429. (2) 3 Bom., H. C., O. C., 49.
(3) I. L. R., 19 Calc., 683.

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

poin'ed out that the fact that a purchaser is interested and concerned in the result has never been held to prevent the application of that section. [O'KINEALY, J.—Has it ever been held that the purchaser can appeal? It has never been the practice.] But he could be added a party, though no case shows he could appeal. The case of *Asizan* v. *Matuk Lal Sahu* (1) (see pages 448 and 458) shows that a purchaser could appeal, as the matter is one which falls under section 244, and, that being so, he has no right to make this application under section 622.

On the merits Act V of 1894 is termed an Act to amend the Code of Civil Procedure, and there is no justification for calling it an Act which deals with substantive law. The Code itself is merely an Act regulating procedure, and section 13 and the other sections referred to do not deal with rights but only with matters of procedure. It was provided by Act V of 1894 that it should come into force at once, and it shows no intention on the part of the Legislature to limit its operation to cases arising after it was passed. It was evidently intended to apply to all pending cases. Its provisions merely extend the time within which the judgment-debtor can pay the amount due. It does not confer any new substantive right, but only prescribes the procedure for fixing the time within which the debt can be paid. The Full Bench cases cited on the other side have no application to this case. (See Wilberforce on Statute Law, pp. 155, *et seq.*)

Babu *Ashutosh Mookerjee* in reply.

The following judgments were delivered by the Full Bench (PETHERAM, C.J., and NORRIS, O'KINEALY, TREVELYAN and GHOSE, JJ.) :—

GHOSE, J.—The question raised in this rule is whether the provisions of Act V of 1894 are applicable to proceedings commenced before that Act came into operation. The decree in this case was pronounced on the 5th January 1894; the application for sale in execution thereof was made on the 30th January; the sale proclamation published in February 1894; and the sale was held on the 26th March 1894. In the meantime, *i.e.*, on the

(1) I. L. R., 21 Calc., 437.

2nd March 1894, the Act in question was passed and came into operation. The judgment-debtor, relying upon the provisions of section 310A, which by that Act was directed to be inserted in the Code of Civil Procedure, applied to the Court which had held the sale, to set it aside upon payment to the purchaser of a sum equal to five per centum of the purchase-money, and to the decree-holder the amount specified in the proclamation of sale; and the Munsif has under that section set aside the sale. If the provisions of Act V of 1894 were intended to have retrospective effect, the Munsif was right in making the order he did; otherwise the order was without any authority. As the law (Act XIV of 1882) stood before the said Act came into force, a person purchasing a property at an execution sale would be entitled to have the sale confirmed unless it were proved that there was material irregularity in publishing or conducting the sale, and that substantial injury was caused by reason of such irregularity (sections 311 and 312). Act V of 1894 so far modified this provision as to provide and insert after section 310 that "any person whose immoveable property has been sold under this chapter may at any time, within thirty days from the date of sale, apply to have the sale set aside on his depositing in Court: (*a*) for payment to the purchaser a sum equal to five per centum of the purchase-money, and (*b*) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder," and that "if such deposit is made within thirty days the Court shall pass an order setting aside the sale." The Act (V of 1894) is entitled to be "an Act to amend the Code of Civil Procedure," and it is stated that "it shall come into force at once." Now I take the rule of construction in a matter like this to be, as it is stated by Wilson, J., in *Deb Narain Dutt* v. *Narendra Krishna* (1) and *Tupsee Singh* v. *Ram Sarun Koeri* (2) that "retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings," and that "an enactment affecting

(1) I. L. R., 16 Calc., 267. (2) I. L. R., 15 Calc., 376.

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

rights of property is not to be so construed as to give retrospective effect, unless the intention that it shall have such effect clearly appears."

It has been contended that the provisions contained in the new section 310A are merely matters of procedure, that it finds its place in an Act which is a Code of Procedure, and that upon the wording of Act V of 1894 itself it is clear that it is intended to have retrospective effect. A question similar to this, so far as the first branch of the argument is concerned, was considered by two Full Benches of this Court in *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1) and *Uzir Ali* v. *Ram Komal Shaha* (2). This was with reference to section 174 of the Bengal Tenancy Act, the language of which is very similar to that of section 310A of Act V of 1894; and it was held that section 174 was not a mere matter of procedure, but conferred a new and substantive right, and that in the absence of any indication of intention that the provision was to operate retrospectively it did not, by the ordinary rules of construction, apply to proceedings under a decree passed before the Act came into operation. If the rule of law, laid down in these two cases, is to be followed, I do not see how it can be held in this case that section 310A is a matter merely of procedure, and does not confer upon a judgment-debtor a new and substantive right, which he did not possess under the Code as it stood before the amending Act was passed. It has, however, been said that the Act, in which section 310A has been incorporated, is merely a Code of Civil Procedure, and the section has been inserted in a chapter which deals with the execution of decrees, and lays down rules as to the sale of immoveable property; whereas section 174 is a part of the law of landlord and tenant, which deals with matters of substantive right. It will, however, be found upon an examination of the Bengal Tenancy Act that it deals with procedure as well as substantive rights, and section 174 finds a place in a chapter entitled "Sale for arrears under a decree," a chapter which, while it lays down what are "protected interests" and the power conferred upon a purchaser to annul encumbrances, prescribes certain

(1) I. L. R., 14 Calc., 636. (2) I. L. R., 15 Calc., 383.

special procedure for, and rules connected with, sales. And if a provision like that, which is contained in section 174 of the Bengal Tenancy Act, is not a matter of mere procedure, but confers a substantive right, I do not see how it can be held that, because it finds a place in a Code of Civil Procedure, it is nothing but procedure, and does not confer a substantive right. As I have already pointed out, in the event of a sale taking place under the Code of Civil Procedure, a purchaser is entitled (barring, of course, a case of fraud or other abuse of the process of the Court) to have the sale confirmed, unless it is proved that there has been a material irregularity in the publishing and conducting of the sale, and unless substantial injury has been occasioned by such irregularity. Section 312 of the Code says that "if no such application, as is mentioned in the last preceding section, be made, or if such application be made, and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser," and so on. The words are "shall pass an order confirming the sale." Section 310A, however, provides that, if within thirty days from the day of sale the judgment-debtor pays up the decree, and in addition a sum equal to 5 per centum upon the amount of the purchase-money, the Court "shall pass an order setting aside the sale." I think, following the Full Bench decisions already referred to, that this provision does confer a substantive right upon the judgment-debtor to have the sale set aside, and that in derogation of the right, imperfect though it may be, which the Code gives to a purchaser. This, I am disposed to think, is not a mere matter of procedure to which retrospective effect should be given. As to the argument derived from the language of the amending Act itself, I must confess that the matter is not free from difficulty, but, after the best consideration I have been able to give to it, I am inclined to think that the provisions of the Act are not clear enough to indicate that it was the intention of the Legislature that it should have retrospective effect. The Act no doubt provides that it shall come into force at once, that section 310A is to be inserted in the Civil Procedure Code, and that it applies to a sale held under this chapter; but these circumstances are not, to my mind, sufficient to indicate that the privilege conferred thereby upon a judgment-

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

debtor was intended to apply to a sale, the proceedings in relation to which had already been taken, "under the chapter" as it existed before section 310A was incorporated in it. I observe that where the Legislature have thought that an Act should have retrospective effect they have said so either in express words, or by clear implication, *e.g.*, section 10, Act IV of 1893, and section 21 of the Bengal Tenancy Act. Upon all these grounds I am of opinion that Act V of 1894 has no retrospective effect so as to apply to the sale in question.

TREVELYAN, J.—The question before us is whether Act V of 1894 has a retrospective effect and applies to proceedings in execution commenced before that Act came into force. There is in my opinion nothing on the face of the Act to show that the Legislature intended it to have a retrospective effect. There is an absence of express provision for retrospective operation such as is to be found in section 10 of Act IV of 1893, and similar provisions in other Acts. There are no words used which in any way indicate that the Legislature intended a retrospective effect. The phraseology of the section which is added by the Act in question to the Code of Civil Procedure is such as to fit into the Code and to be read with the other provisions of the Code. There is nothing in the words of the section which indicates an intention to do more than merely supplement the provisions of the Code. It has been so drawn as to be read into the Code, and its form has, in my opinion, that object only. That form has no reference to whether its operation is to be retrospective or only prospective. There are certain cases, such as those to be found at page 165 of Wilberforce's Statute Law, 1st edition, where particular words have been held to show by implication that the Legislature intended retrospective operation to be given to the provisions of a Statute. I can find nothing of the kind here. Moreover, in considering this question, I think one is entitled to assume that the Legislature had in view the state of the authorities in this Court on this subject. The recent decisions of Full Benches of this Court on similar provisions of the Bengal Tenancy Act, to which I shall presently refer, must be taken to have been in the contemplation of the Legislature the more so, as since the decision of those cases, we find that

when they intend to give retrospective operation to an Act they do so in express terms.

There remains the question as to whether retrospective operation should be given to this enactment on the ground that it relates to procedure only. I do not think it necessary for us to examine this question as if it were "*res integra*." The matter is in my opinion concluded by authority. I fail to find any real distinction between the decisions of the Full Benches of this Court in the cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1) and *Uzir Ali* v. *Ram Komal Shaha* (2) and the present case. Section 174 of the Tenancy Act contains a provision similar to the one in Act V of 1894. In the case, *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1) the Full Bench pointed out that that provision created *a new right* which judgment-debtors did not possess under the old Act. Similarly here, the new section 310A confers upon judgment-debtors *a new right* which they did not possess under the Civil Procedure Code as unamended, as pointed out by the Full Bench in *Uzir Ali* v. *Ram Komal Shaha* (2). The case of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1) held that section 174 was not a matter of mere procedure, but conferred a substantive right. It is sought to distinguish these cases by the fact that the provisions of the Tenancy Act are in the main provisions of substance and not of procedure. This is to my mind no answer. Many Acts which are in the main Acts otherwise than of procedure deal also with matters of procedure. In the same way Acts of Procedure occasionally deal also with rights. It is always necessary to see whether the particular provision is one of mere procedure or dealing with rights. Two Full Benches have held that a section equivalent to the section in question is not a matter of mere procedure, but confers a substantive right. I think that until the Legislature deals with this matter we are bound to follow these decisions. I would make the rule absolute with costs.

O'KINEALY, J.—This is a rule obtained by Girish Chundra Basu, the auction-purchaser at a sale held under the Civil Procedure Code, against the decree-holder and judgment-debtor, calling upon them to show cause why the decision of the Munsif

(1) I. L. R., 14 Calc., 636. (2) I. L. R., 15 Calc., 383.

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

in the Court below, dated the 30th April 1894, declaring that section 310A, which is a new section added to the Procedure Code by Act V of 1894, did not apply to the sale, should not be set aside. Act V of 1894 proposes to amend the Code of Civil Procedure. In clause 2 of section 1 it declares that it shall come into force at once ; and in section 2 it declares that after section 310 of the Civil Procedure Code the following section, namely, section 310A, shall be inserted. The question, therefore, which we have to decide is whether, on the well-known rules of construction, section 310A is a rule of procedure or one which destroys any vested interest in the purchaser existing before its enactment. In the course of the argument before us reference has been made to three cases decided in this Court. The first case is that of *Lal Mohun Mukerji* v. *Jogendra Chunder Roy* (1). The decision in that case was a decision with reference to the provisions of section 174 of the Bengal Tenancy Act. That Act is an Act to amend and consolidate certain enactments relating to the law of landlord and tenant—an Act which, on the face of it, creates substantive rights and interests in the soil to be carried out to a large extent under the procedure of the Civil Procedure Code. In that case it was decided that section 174 of that Act had not retrospective effect. The next case is the case of *Tupsee Singh* v. *Ram Sarun Koeri* (2). In that case it was decided that section 21, sub-section 2 of the Bengal Tenancy Act had retrospective effect, and applied to suits pending at the date of the commencement of that Act. The third case is the case of *Deb Narain Dutt* v. *Narendra Krishna* (3). That was a case depending upon the construction of the Rent Act, and section 6 of the General Clauses Consolidation Act, namely, Act I of 1868. The general rule of decision applicable in all these cases was that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights ; but that provisions affecting mere procedure apply to pending cases. I accept that principle, but I accept it also with the reservation pointed out by Mr. Justice Wilson in *Deb Narain Dutt's* case at page 270 that there is no use in citing one Act for the purpose of construing another, no

(1) I. L. R., 14 Calc., 636. (2) I. L. R., 15 Calc., 376.
(3) I. L. R., 16 Calc., 267.

more than there is to refer to the construction of one document as a guide to a Judge in construing another. In both cases the rules laid down to guide us in coming to a conclusion are the same.

Each enactment, as it is in the case of each document, must be construed by itself according to the intention of the framers. If, therefore, we turn to section 310A to find out whether it is a section of procedure or one affecting a substantive right, we have the following circumstances to guide us. Act XIV of 1882 is an Act to consolidate and amend the laws relating to Procedure of Courts of Civil Judicature. On the face of it it is an Act of Procedure and nothing more. It provides the form and manner of conducting and carrying on suits through their various stages from commencement to final judgment and execution according to principles and rules laid down in the Act itself. In form, in name, and in substance it professes to deal with matters of procedure and not matters of right. Chapter XIX of the Code deals with execution of decrees. This Chapter is divided into several parts of which *A* describes the way in which decrees may be executed ; *B* deals with applications for execution ; *C* deals with staying execution ; *D* refers to questions for the Court executing a decree ; *E* describes the modes of execution ; *F* refers to attachment of property, and *G* is that portion of the Code which has been amended by the section in question and treats of sale and delivery of the property. This last division is still further subdivided : (*a*) contains the general rules under which sales and delivery of property should be made ; (*b*) lays down rules as to moveable property ; and (*c*) prescribes rules as to immoveable property. It is in this subdivision (*c*), that is to say, in the rules prescribed as to how a Court should sell immoveable property, that section 310A is directed to be inserted. It seems to me what the Legislature intended was to amend the rules of the Civil Procedure Code in regard to sale and delivery of immoveable property. That seems to me both in form and substance a rule of procedure under which no party has a vested interest. For these reasons alone I am of opinion that the rule should be discharged. But in addition to this I think there are other reasons which ought to bring us to the same conclusion. Section 310A provides that if a person

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

applies under section 311 he shall not get the benefit of section 310A. It appears to me that section 311 refers to matters of procedure and procedure only. It is not therefore unreasonable to presume that when two alternative remedies are prescribed, and one of them is a matter of procedure, the other ranks no higher. Apart, however, from the interpretation that I have put upon Act V of 1894, there seem to be other objections to making this rule absolute. Under section 316 of the Code a purchaser has no vested interest in the property before the date of his certificate. If before that date the judgment-debtor pays into Court the amount due, the execution would cease, and the purchaser could not insist upon the sale being confirmed and a certificate being given to him. Moreover, as pointed out in the decision of their Lordships of the Privy Council in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1) that when a question arises under section 244, the fact that the purchaser, who is not a party to the suit, is interested in the result, has never been held to be a bar to the application of section 244. Now, the question to be decided under section 310A is one which falls under section 244. By section 2 of the Code the determination of any question mentioned or referred to in section 244, but not specified in section 588, is within the definition of "decree;" and I observe that the matter dealt with in section 310A is not specified in section 588. If therefore we were to make such a rule absolute it would be to allow a person who has no vested interest in the property, nor the carriage of the suit, to ask the Court to decide, as between him and the parties to the suit, a point which is properly the subject of appeal between the parties. It seems to me that that is not a position in which we ought to place ourselves. For all these reasons I would discharge the rule.

NORRIS, J.—I have had the advantage of considering the judgment that has been delivered by Mr. Justice Ghose. I entirely agree in the reasoning therein adopted and in the conclusion arrived at.

PETHERAM, C.J.—On the 5th of January 1894 Jogendra Nath Banerjee obtained a money decree against Apurba Krishna Dass for Rs. 36, and on the 30th of the same month applied to

(1) I. L. R., 19 Calc., 683.

execute the decree. The property now in question was duly attached in the execution proceedings, and on the 8th of February a notification was issued by which it was notified that the property would be sold on the 26th of March. On the 2nd of March the Civil Procedure Code Amendment Act 1894 came into operation. On the 26th of March the property was sold and purchased by Girish Chundra Basu, the present petitioner. On the 17th of April the judgment-debtor applied under section 310A of the Civil Procedure Code to have the sale set aside, and on the 30th the Munsif made an order under that section setting it aside. This rule was afterwards obtained from this Court on the application of the purchaser to set aside the order of the Munsif and to affirm the sale. Baboo Ashutosh Mukerjee in support of the rule has relied on three Full Bench cases of this Court—*Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1), *Uzir Ali* v. *Ram Komal Shaha* (2), and *Deb Narain Dutt* v. *Narendra Krishna* (3). In the first two of these cases the question turned on the construction of section 174 of the Bengal Tenancy Act, and in them the learned Judges held that when a decree had been obtained before that Act had come into operation the judgment-debtor could not avail himself of that section, although the sale took place after the Act had come into operation. Mr. Justice Mitter in giving the judgment of the Court in the first case says: "Section 174 of the Bengal Tenancy Act confers upon the judgment-debtors a new right which they did not possess under the old Act. Therefore the presumption is (in the absence of express legislation or direct implication to the contrary) that its operation is not intended to be retrospective." The second case merely followed the first. In the third case the question arose under section 170 of the Bengal Tenancy Act, and the judgment is only useful to us in the present case, in so far as Mr. Justice Wilson in delivering the judgment states the rule which should guide Courts in such cases. At page 272 he says: "The rule is that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings."

(1) I. L. R., 14 Calc., 636. (2) I. L. R., 15 Calc., 383.
(3) I. L. R., 16 Calc., 267.

1894

GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS.

The object, to attain which section 174 of the Bengal Tenancy Act was enacted, resembles very closely that to attain which the Civil Procedure Code was amended by the addition of section 310A. The two Full Benches of this Court have held that the object was attained in the case of the Bengal Tenancy Act by the creation of a new right, and not by a mere change of procedure, and we are no doubt bound to follow those decisions. The words used in the Civil Procedure Code Amendment Act, 1894, are however very different from those used in the Bengal Tenancy Act, and the Act in which the amendments are made is one of an entirely different description from the Bengal Tenancy Act, it being one whose sole purpose is to provide and regulate the procedure of the Civil Courts, and as for those reasons the present case is not identical with those in the two Full Bench cases it is not concluded by them, though in deciding it we must be guided by the principles which are enunciated in those cases. I am of opinion that upon those principles, both as they are explained by Mr. Justice Mitter in the first case and by Mr. Justice Wilson in the second, this sale is subject to the provisions of the Civil Procedure Code as amended by the Act of 1894 ; in other words, that it is subject to the provisions of section 310A of the Code. The new section appears in Chapter XIX of the Code which is headed "Of the execution of decrees," and is the Chapter which provides the machinery by which a successful litigant may obtain the fruits of the decree which has been made in his favour. By this machinery a person who has obtained a decree for money could, before the 2nd of March 1894, realise his claims by having the property of his debtor sold by the Court unless the money is paid before the sale, and all that the new section has done, as far as the decree-holder and his debtor are concerned, has been to extend the period, during which the debtor may discharge his liability by payment, for 30 days beyond the date of the sale. This in my opinion is a mere modification of the mode in which the successful litigant may obtain the fruits of his decree, and is strictly within Mr. Justice Wilson's definition of the principle in the passage which have already been quoted. But even if we were bound, in consequence of the decision of the Full Bench in the first case, to hold that the new section of the Code

created a new right in the judgment-debtor, still I think that the result will be the same, as in my opinion the words used in this Act bring it strictly within the exception mentioned by Mr. Justice Mitter, in delivering the judgment of the Full Bench in the first case. The Act of 1894 came into operation on the 2nd of March, and from that day section 310A has been as much a part of the Civil Procedure Code as any other section of it. The section on its face applies to all sales under the Code, and this according to the ordinary meaning of words must mean the Code as it exists at the time when the sale takes place; and by using the words which have been used the Legislature have, in my opinion, expressly enacted that this section shall have retrospective effect in the sense that it shall take effect on sales made after the Act had come into operation, though the execution proceedings of which the sale was a part had been commenced before it had come into operation. I would only further remark that no injustice can result from this reading of the section, as it does not affect any interest which was in existence before the 2nd of March, the purchaser not having acquired any until the 26th, at which time the new law was in force. For these reasons I am of opinion that this rule should be discharged.

The result is that in accordance with the opinion of the majority of this Bench the rule will be made absolute with costs.

H. T. H. *Rule made absolute.*

APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

WAFADAR KHAN AND OTHERS (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT.)*

1894 *July* 23.

Charge to Jury—Misdirection—Appeal Court, Powers of, in cases of trial by jury when there has been misdirection—Rioting—Common object—Alternative charges—Criminal Procedure Code (X of 1882), ss. 236, 303, 418, 423 and 537.

An accused in a trial by Jury is entitled to the verdict of the Jury on questions of fact, and where a verdict is vitiated owing to misdirection by the

* Criminal Appeal No. 427 of 1894, against the order passed by B. G. Geidt, Esq., Officiating Sessions Judge of Hooghly, dated the 6th of June 1894.

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

Judge, the Appeal Court has no option but to set aside the verdict and direct a retrial. Were the Appeal Court to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the Jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appeal Court can only arrive at a decision on the perusal of the evidence.

Makin v. *Attorney General of New South Wales* (1) referred to.

Section 537 of the Code of Criminal Procedure does not warrant an Appeal Court, in a case where there has been misdirection in a charge to a Jury, going into the evidence with a view to decide whether there is sufficient evidence to justify a conviction. Under section 418 an appeal in a case tried by a Jury lies on matters of law only, and the Appeal Court has no power to try the accused on matters of fact. The word "erroneous" in clause (*d*) of section 423 must not be read as "wrong on the facts," but must be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law.

Fourteen accused were charged with rioting armed with deadly weapons, and with murder and causing grievous hurt during such riot. The common object alleged by the prosecution was to compel the payment of certain money by one of the persons of the opposite party. Some of the accused who admitted their presence at the scene of the occurrence stated that they had been attacked on account of an allegation being made that one of the opposite party had enticed away another's wife, and that they had merely acted in self-defence. The case was tried before a Jury, and on the close of the case for the prosecution the Sessions Judge, considering that possibly the common object alleged by the prosecution might be considered not to have been proved, amended the charge and added an alternative common object to it, *viz.*, that the object of the assembly was to punish one of the opposite party for enticing away another's wife. There was no evidence on the record to prove the alternative common object, it being based solely on a portion of the statements of some of the accused, and the Sessions Judge put it to the Jury that it was an inference that could possibly be drawn from the evidence, but it was for them to draw that inference or not. The Jury convicted all the accused without specifying which common object they relied on, and were not asked, under section 303 of the Code of Criminal Procedure, any questions for the purpose of ascertaining what their verdict was based on.

Held, that the Judge had misdirected the Jury, and that the verdict of the Jury leaving it uncertain what was the common object which actuated the accused, it was bad in law, and that the conviction must be set aside and the case retried.

Held, further, that it was unfair to use a part of the statements of some of

(1) L. R. (1894), A. C., 57.

the accused put forward in their defence as justifying the use of force by them in repelling the attack of the opposite party, for the purpose of showing a common object as against them, and that the statements should have been taken in their entirety and could not in any event be used as against the rest of the accused.

Held, further, that if the Sessions Judge was of opinion that there were grounds for charging the accused with a common object other than that alleged by the prosecution, his proper course was not to amend the charge but to add a separate count or counts to the charge upon which a separate verdict could be taken. Section 236 of the Code of Criminal Procedure only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not where there may be a doubt as to the facts which constitute one of the elements of the offence.

THIS was an appeal preferred by fourteen Kabulis who had been tried by the Sessions Judge of Hooghly and a Jury and convicted of offences under sections 148 and 325 read with section 149 of the Penal Code and sentenced to various terms of imprisonment.

The prisoners were tried on four separate charges, namely, (1) murder under section 302 read with section 149; (2) culpable homicide not amounting to murder under section 304 read with section 149; (3) rioting armed with deadly weapons under section 148 read with section 149; and (4) causing grievous hurt under section 325 read with section 149. The Jury found them all not guilty on the first two charges, but convicted them on the third and fourth charges. The appeal was preferred mainly on the ground that the Sessions Judge had misdirected the Jury in his charge.

The common object as originally set out in the third charge was "by means of criminal force to compel Mir Azad to pay money which he was not legally bound to do and to use criminal force on Mir Azad and his party," but during the trial the Sessions Judge, after the case for the prosecution was closed, amended that charge under the provisions of section 227 of the Code of Criminal Procedure, and added an alternative common object in the following words, "or else to punish Khan Ghalib for having enticed the wife of one Sher Ali."

The facts of the case appear sufficiently from the charge of the Sessions Judge, the material portions of which were as follows:—

The charges against the accused are four in number. The first to which I shall call your attention is that numbered three, *viz.*, that they were guilty

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

of rioting armed with deadly weapons, and, that as members of the unlawful assembly engaged in that rioting, they had a common object which has been specified in the alternative, and as to which I will address you later on. Further, the accused are all charged with murder, culpable homicide, and grievous hurt as offences committed by some member or members of the unlawful assembly. If any of these offences was committed in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, then each member of the unlawful assembly is considered guilty of these offences, whether he actually committed it or not. The case for the prosecution is briefly as follows :—

There is a small colony of Kabulis, about eleven in number, living together at Bhadresar, in a lodging which some call Mir Abdullah's lodging and others call Mir Azad's lodging. It is alleged that a band of other Kabulis living at Maula, Simla, Rishra, Champdani and other places were collected together by Wafadar, the accused No. 1, and that this band, estimated in number from 25 to 40, armed with *lathies* under the leadership of Wafadar, went to the house where the colony at Bhadresar were living, and that some 15 or 16 entered the house ; that Wafadar demanded from Mir Azad, one of that colony, money which he said Mir Azad ought to pay him. Mir Azad denied any liability to pay money to Wafadar, and that therefore Wafadar gave the order to beat the fellow. Mir Azad, however, retreated and made his way to the *thannah*. Khan Ghalib, who was at the time in Mir Abdullah's lodging, raised his arm to stop any violence, whereupon, under Wafadar's order, Wafadar's followers attacked Khan Ghalib so savagely, and beat him so unmercifully, that Khan Ghalib died in a few minutes. The other Kabulis living in Mir Abdullah's lodging interposed, but were themselves severely handled, one of them, Khan Ghalib's son, receiving injuries on the head and having his arm broken. It is alleged that all the accused were members of Wafadar's band.

That is shortly the story of the prosecution. The defence on the other hand is two-fold. Six of the accused have a story to tell of the occurrences of that afternoon. They say that they had been invited to dinner, and on their way to their host's house they passed through Bhadresar. There they met Mir Abdullah and other members of the colony, who requested them to come into their lodging, and rest awhile, and have a smoke and drink. With this request they complied. Khan Sadik offered the wayfarers *sherbet*. The latter replied that they would not take drink at his hands, because Khan Sadik had offended their moral sense by living with another man's wife. This speech made the inhabitants of the colony very angry, and they attacked their guests with *daos*, wounded them and drove them forth from the house, though they admit having defended themselves with *lathies*. This is the substance of the story told by Wafadar, and the other five who were, he says, accompanying him to dinner adopt that story as their own. The remaining eight accused deny all knowledge of any occurrence of the sort told by the prosecution, deny that

they were present in Wafadar's baad, and give various reasons why they have been falsely accused in this case.

You have thus two stories laid before you as to the occurrences of the afternoon of 20th April. On the one side you have an account of a premeditated attack carried out with violence. On the other side you have an account of an affray attributed almost to an accident, arising out of an angry word spoken almost on the spur of the moment. One portion of your task will probably be to determine which of these two stories is true, or whether either of them is true.

In dealing with matters which are uncertain and in dispute, it is important to apprehend clearly in your minds those facts which are not in dispute and any other facts, which, though disputed, you may yet hold to be so certainly proved that you can make them a basis for drawing inferences as to facts which are uncertain. In other words, you must reason from the known to the unknown. I proceed, therefore, in the first place to put before you certain facts which are either admitted by the parties, or else are proved by evidence, of the truth of which it is possible you may have no reason to entertain any doubt.

(1.) In the first place you have it admitted that there was a fight in Mir Abdullah's house in the afternoon between two contending sets of Kabulis, one set of whom lived in the house and the other set of whom came from some distance. Members of each set were wounded, some of them very severely, and you have it from the medical evidence that the external wounds of the inmates of the house which are bruises were caused by blunt instruments such as *lathies*. The wounds on the other side—the strangers, as I may call them—were incised wounds, caused by some sharp cutting instrument, such as *daos*. There can be no doubt then that the strangers, as has been stated in the evidence, were armed with *lathies*, and that the inmates of the house snatched up anything that first came to hand, and that the *daos* which were found lying about by the Sub-Inspector and have been produced in Court were the instruments used by the inmates of the house, and not by the other party. *Daos*, such as these shown to you, are common articles of domestic use, for the purpose of cutting up vegetables, fish and such like things; and it is not unlikely that they would be lying about and picked up as the most convenient instrument available at the moment of a sudden attack, whether for offence or defence.

(2) In the second place you will probably not find it difficult to arrive at some definite finding whether Khan Ghalib was present at the disturbance, and received in that disturbance the injuries, which the medical evidence shows resulted in his death. The accused, who speak to the affray, deny that Khan Ghalib was in the house at all, or at any rate they say he was not there. These accused went off after the occurrence to the Serampore *thannah*, and there complained of an attack on themselves, and in their complaint stated that Khan Ghalib was one of those who invited them into the house. Those

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

inmates of Mir Abdullah's lodging who have given evidence in this case almost all speak of Ghalib's presence, and most of them describe how he was beaten; but the most convincing testimony is that of the Sub-Inspector who must have arrived on the spot within half an hour almost after the disturbance was over, and this is what he says (Sub-Inspector's evidence read.) On this evidence, coupled with the medical evidence, can you entertain any reasonable doubt that Khan Ghalib was at the time of the disturbance in Mir Abdullah's lodging, and that in the course of that disturbance he received the injuries which resulted in his death?

(3.) The third point on which I think it is perhaps possible to come to some certain finding free from reasonable doubt is the question whether information had been given by Mir Abdullah to the police in the morning of the Friday, on the afternoon of which the disturbance occurred, information namely that Wafadar and Shamudar contemplated an attack on Mir Abdullah and his party on account of ill-feeling arising out of money dealings. Under date of April 20th you find two consecutive entries, one purporting to have been made at 8 o'clock in the morning and the other at 4 o'clock in the afternoon of that Friday. The first relates to information given by Mir Abdullah that an attack was apprehended, and the second information given by Azad that an attacking party had arrived. The Sub-Inspector deposes that these entries were made at the time recorded, and that he made them with his own hand. You are asked by the pleader for the defence to disbelieve the Sub-Inspector, because there are blank spaces in the station diary, and that it is possible therefore that the entries many have been made on a subsequent day. It is for you to judge what force there is in that argument. The diary for each day at a police station must always begin, as you have been told, with the printed form on the right hand page, showing the number of men and officers present. The occurrences of the day are then entered under this form, and if there are not sufficient entries to fill the blank papers, there must of necessity be a space intervening between the last entry on any day and the printed form for the following day. But there is one fact which has been brought to your attention by the pleader for the defence himself which seems effectually to dispose of the opinion expressed by him that it was possible the entries which you are now considering were made on a subsequent day. The diary is closed at Bhadresar for each day at four o'clock, as the post then goes out, and a copy is sent to head-quarters. At the close of each day you will find what I may call a meteorological report of the past twenty-four hours stating whether there has been wind, rain or storm, under the heading "miscellaneous news." Immediately following the entry as to Azad's information there is such a meteorological report, and then a notice that the *dâk* has been made up. We know from the Sub-Inspector that after receiving Mir Azad's information he went to the scene of occurrence and remained there several hours. If the *dâk* was made up as usual at 4 o'clock and the meteorological entry then, it was impossible for the entries to have been

subsequently added. Another point to which the pleader for the defence has called your attention is to the fact that the word "*lena*" seems to have been subsequently added as a correction, after the rest of the entry had been made, but I fail to see how such a fact affords the slightest indication whether the entry itself was made at the time it is said to have been made, or whether it was made subsequently. The addition is of little or no importance and is consistent with either supposition. To sum up so far: There are three main facts which, if you believe the Sub-Inspector, you may perhaps be able to consider as placed beyond all reasonable doubt, on the admitted facts of the case and on the Sub-Inspector's evidence :—

I. There was a disturbance in Mir Abdullah's house between two sets of Kabulis, in the course of which severe injuries were received on either side.

II. That Khan Ghalib was present, and in the course of that disturbance received the injuries which resulted in his death.

III. That information was given by Abdullah that an attack was premeditated.

I now proceed to lay before you and examine the two accounts of the affray. I will first take the story told by Wafadar and five others of the accused. They say they were invited to take *sherbet*, but as they refused to take it from Khan Sadik's hands, and gave as their reason that his father was living in adultery, they were set upon by Khan Sadik's friends. This story, though it admits the disturbance, omits all mention of Khan Ghalib's presence and does not account for the information given that Friday morning to the Police. It is also at variance with the information given by Sap Khan, one of the six accused, who went to Serampore and spoke on behalf of the party. In the complaint lodged by him to the Head Constable, that is, in the complaint which has been produced before you and proved by the Head Constable, there is not a word about Khan Sadik offering *sherbet* and their refusal to take it. I do not even find Khan Sadik mentioned. The omission on the part of Sap Khan is unaccountable, if Khan Sadik's conduct was the *fons et origo mali*, the origin of the whole disturbance. It is argued that the omission was not on the part of Sap Khan, but on the part of the Head Constable who recorded the statement. Does it seem likely to you, hard as these Kabulis' language is to understand, that the Head Constable should have failed to understand, or if he did understand, to record one of the most material parts of the information? There is also another and direct reason for not accepting such an argument. The six accused were accompanied to the Serampore police station by two pleaders and a mukhtear, who may be presumed to have looked after their clients, and to have seen that the complaints were properly put before the Head Constable. Had the incident about *sherbet* been related at the *thannah*, it would have been easy for the accused to have adduced unimpeachable evidence of the fact.

It is for the Jury to decide whether the story now set up by Wafadar, Sap Khan and four others is true or not. If it is true that the quarrel was

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

unpremeditated, and that these six were attacked with *daos*, you would probably come to the conclusion that they were acting in self defence when they inflicted injuries on Khan Ghalib and the other members of Abdullah's party. There would be no ground for the charge of rioting against any of the accused, and you would acquit them all on all the charges.

Should you, however, come to the conclusion that Wafadar's story is not true, you must be careful not on that account to presume that the account given by the witness for the prosecution is true. The burden of proof lies on the prosecution, and it is your duty to examine, with even greater care and attention, the case for the prosecution, and decide whether it or any portion of it is true. That case I now lay before you in greater detail than I have as yet done.

It is said that some six months ago one Mahomed Amir came to this part of the country from Peshawar district, and after a short stay went home again. That during his stay here he advanced sums of money to three Bengalis, amounting to Rs. 35 in all, and that when he was departing he entrusted Mir Azad with the task of collecting this money and remitting it to him. Then it is said that a few days before the occurrence Wafadar sent word to Azad that Azad was to pay the sums collected for Mahomed Amir to Wafadar, whose ryot Mahomed Amir was. Azad replied that he owed no money to Wafadar, and when he collected what was due to Amir, he should remit the sum to Amir direct. On the Thursday, the day before the disturbance, Daulat says he saw Amir in the company of a number of Kabulis who are identified as having come on the following day; and that he overheard Wafadar assert his intention of getting the money out of Azad by force. Daulat secretly came and told Azad what he had heard, and this led to the information being given at the *thannah* on the following Friday morning, of which you have already heard. Then you have had the evidence of a number of Kabulis living with Abdullah, and Abdullah himself, relating how Wafadar arrived at the house with an armed band of forty men. Sixteen of them came into the house, and Wafadar repeated in person the request he had previously made to a messenger, and received much the same answer. Wafadar attacked and ordered others to attack Azad. Azad escaped scot-free and ran off to the *thannah*. When Khan Ghalib interposed, the attention of of Wafadar and his companions were directed to that unfortunate man, and he was attacked as well as others who came to defend him, including his son Sadik (or Sadyak). Every single one of the accused is pointed out as having been present in Wafadar's band, and some of them are stated to have entered the house, and others to have gone round by a lane to the courtyard at the back of the house.

Now this story is consistent with the three main facts which I have enumerated above, as those which, on the admission and the evidence, you may find to have been proved for certain. It accounts for the fight, it accounts for the wounds and death of Ghalib, and it accounts for the information given

early on the morning of Friday, 20th April. At the same time there are two or three points in the story to which it is right that I should draw your attention.

In the first place does not Wafadar's conduct strike you as somewhat strange? Assuming (for the moment only) that Mahomed Amir had made loans to some Bengalis, and had intrusted Azad with their collection, and assuming also that Wafadar, whether under authority from Mahomed Amir or not, wished that the collections made by Azad should be handed over to him, it does not seem at all likely that Wafadar should have resorted almost at once to force in order to give effect to that wish. Would you not have expected that Wafadar should come once at least to Mir Azad in a friendly way and personally tell Mir Azad of Mahomed Amir's wishes? Is it likely that after sending a verbal message, he should have come with a band of thirty or forty to realize a sum of Rs. 35, even before he knew whether Mir Azad would comply with a personal request? In the second place see how Mir Azad escaped without injury, while Khan Ghalib, who apparently had no concern with the dispute between Wafadar and Mir Azad, was so severely beaten that he shortly succumbed to the injuries then received. And all for what? For merely raising his hand to forbid violence towards Mir Azad. It seems to me hardly possible that we have had from the witnesses for the prosecution the whole truth, and it seems very probable that they have either kept back something, or invented something to explain the common object of their assailants. On the other hand there is a certain amount of corroboration for the story that the dispute arose out of money dealings.

On the morning of that Friday Mir Abdullah had reported a likelihood of a breach of the peace on account of money dealings, or (if you think that the word *lena* was subsequently added) on account of money due (the latter interpretation accords better with the story now told). On the same afternoon, Mir Azad, who had escaped, reported the arrival of the opposite party, and used, if we trust the diary, almost the same expression. The expression is no doubt vague, but then when the Sub-Inspector went off to the scene of the occurrence, he took down a statement of Mir Abdullah, which, except in one particular to be noticed presently, gives the same account of the origin of the disturbance as you have heard in Court. (First information of Mir Abdulla read and points of similarity to present story noticed). If the whole of the story about Mahomed Amir were false, where had Mir Abdullah, who had also been wounded, the time or opportunity to concoct the story? It is easier, however, to give an account which is true in the main, but distorted as to some of the facts, than to invent an altogether false story, and it will be for you to consider whether the former view is correct in the present case.

Whatever corroboration of the present story is afforded by the earlier informations, and the information given directly after the disturbance was over, it is scarcely possible to get over the impression that something has been

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

concealed, or not truly told, an impression arising from the improbable nature of the conduct attributed to Wafadar. There are certain facts which seemed to me to point to a different motive on the part of Wafadar and his party.

You have in the first place the fact that Khan Ghalib was living with the wife of Sher Ali, a fellow-countryman of the parties. Whether Sher Ali had divorced the woman and Khan Ghalib had married her we have no evidence to determine one way or the other, but you have this fact from the mouth of the accused themselves that Khan Ghalib's behaviour in living with Sher Ali's wife was considered by Wafadar, and the five others who admittedly accompanied him, to be adulterous, and that it aroused so much irritation and animosity in their breasts that they would consider it an insult to be offered water by Khan Ghalib's son.

In the second place you have the fact that it was Khan Ghalib who was done to death, and that, of the other persons living in Mir Abdullah's house, it was Khan Ghalib's son who was most severely injured.

It was a consideration of these circumstances that led me to alter the third count of the charge by adding in the alternative a sentence to the charge sheet, with reference to the common object of the assembly. The common object of the unlawful assembly defined in the charge sheet as now framed is either (1) by means of criminal force to compel Mir Azad to pay money which he was not legally bound to do; and (2) to use criminal force on Mir Azad and his party, or else to punish Khan Ghalib for having enticed the wife of Sher Ali. The first object is that which is definitely alleged by the prosecution; the second or the alternative object is not alleged by the prosecution. If, however, you are convinced that the story of Wafadar and his party coming to the house and of their beating Khan Ghalib in such a way as to cause death is true, it will not be an unfair or unjust inference to make from the statements of some of the accused themselves, corroborated as it is by the evidence of some of the witnesses for the prosecution that Khan Ghalib is living with a woman who was Sher Ali's wife, and whom he is not proved to have married, that the common object of the band was to punish Khan Ghalib for enticing Sher Ali's wife. Whether you should draw that inference or not is a matter entirely for you to decide. I only point out that it is an inference that is possible on the evidence. I have stated that the first information given by Mir Abdullah directly after the disturbance differs in one particular from the story now told. The name of the person to whom Mahomed Amir is said to have lent the money is stated in the first information to be Afzal Khan. The public prosecutor thinks that is only a mistake for Mir Azad—a mistake caused by the difficulty of catching the exact pronunciation of names as made by these up-country men, of which you had many illustrations in Court. That is an explanation which might be accepted in default of any other, were it not for the fact that among the persons living in Abdullah's lodging there is one whose name is given by Mir Abdullah in Court as Mir Afzal Khan. Afzal Khan is much more likely to be a mistake

for Mir Afzal Khan than for Mir Azad. If this view is correct, there is still greater room for doubt whether the story about Mahomed Amir entrusting Azad with the collection of his dues is correct. I have however before pointed out that money matters were even before the riot referred to as the cause of animosity on Wafadar's part. I have also pointed out that Mir Abdullah had hardly time for concocting an altogether false story, and that he was more likely to have distorted a true story. These considerations raised in my mind a suspicion whether the person to whom Mahomed Amir entrusted his collections was not Khan Ghalib himself. If that were so, the variation as to Afzal and Azad would be accounted for, *viz.*, by the desire to avoid all mention of Khan Ghalib, whose adulterous intercourse, if there was such, it would be natural for his friends to endeavour to screen. It would perhaps account for the conduct on the part of Wafadar and his companions. They did not want him to collect Mahomed Amir's dues, and this object would be both to prevent him from doing so, and to punish him for his behaviour. As I have said, however, this is only a suspicion, unsupported by direct evidence, and arising from some of the aspects of the case and of the evidence put forward by the prosecution. It is not inconsistent with the alternative common object alleged in the charge.

It is for you now to come to some finding as to what happened on the afternoon of 20th April and to determine what offences were committed by the accused.

(1) Are you satisfied that a band of men armed with *lathies* (sticks) came to Mir Abdullah's lodging on the afternoon of 20th April ? Are you satisfied that the common object of the band was either of those stated in third count ? Are you satisfied that violence was used in prosecution of the common object? Are you satisfied that all or any of the accused were members of that band and were armed with *lathies* ? If so, then those of them who were there would be guilty of rioting armed with deadly weapons.

(2) Are you satisfied that Khan Ghalib's death was caused by injuries received from any member of that band ? If so, then you will have to consider what offence was committed when those injuries were caused. * *

(3) Lastly, if you have come to a finding that there was an unlawful assembly, which committed rioting, if you have come to the conclusion that murder, culpable homicide, or grievous hurt was caused by the injuries inflicted on Khan Ghalib and the others, you will have to consider whether such offence or offences (murder, culpable homicide, or grievous hurt) were committed in the prosecution of the common object, or such as the members knew were likely to be committed in the prosecution of the common object, were they a natural consequence of the common object ? If you find that the offence of murder, culpable homicide, or grievous hurt was committed in prosecution, &c., or such as the members knew to be likely to be committed, then each member of the unlawful assembly is deemed guilty of the offence. If you find that the offence of murder was not a

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

natural consequence of the common object, then you will have to determine specifically whether any of the accused committed that offence. As to Khan Ghalib, the only person said to have struck him was Wafadar (section 34 of the Penal Code referred to). If Wafadar did not by himself commit the offence, if he did not himself deal the blow or blows which caused Ghalib's death, yet if you find that he struck a blow in concert with the others who actually caused the death, and with a common object, he is guilty of the same offence as those who caused the death. I notice you yourselves recorded notes as to the person by whom the different blows on the other persons were struck, but if you wish it I will read out the evidence from my notes. Remember that if there was an unlawful assembly, a rioting, and if the offence you may find to have been caused when the injuries on Khan Ghalib and the others were inflicted was in prosecution of a known likely consequence of the common object, you need not find specifically who caused those injuries, it will only then be necessary to determine whether the accused or any of them were members of the unlawful assembly. But if there was no unlawful assembly, or if the offences committed were not in pursuance of, or a likely consequence of the common object, then it will be necessary to determine specifically whether all or any of the accused committed the offence himself."

The Jury having found all the accused not guilty on the first two charges, but guilty on the third and fourth charge, the Sessions Judge sentenced Wafadar Khan, as the leader of the assembly, to five years' rigorous imprisonment and all the others to three years' rigorous imprisonment each.

All the accused appealed to the High Court. The grounds of appeal, amongst others, were: that the amendment in the third charge by the Sessions Judge, after the close of the case for the prosecution, by adding the alternative common object referred to above, was made without there being any evidence on the record to support the allegation, and that he ought to have directed the Jury that there was no evidence that Khan Ghalib had enticed the wife of Sher Ali, or that the common object of the assembly was to punish Khan Ghalib for having done so, whereas he did not so direct them; that he misdirected the Jury by telling them that the inference that this was the common object of the assembly was one which could be possibly drawn from the evidence, notwithstanding the fact that there was no evidence on the point, and that it was not the common object alleged by the prosecution; that as it appeared that the Sessions Judge did not accept, and was not satisfied that

the common object alleged by the prosecution had been proved, if the Jury, as they might have done, having regard to the directions given them, held the same view, the accused had been convicted of being members of an unlawful assembly with a common object of which there was no evidence, and that if the Jury disbelieved the evidence of the common object alleged by the prosecution, they could not legally find the accused guilty in the absence of any evidence of a different common object, and could only legally find the person or persons guilty of causing the injuries to Khan Ghalib and Khan Sadik whom they might find to have respectively caused the injuries, and that none of the other accused could be held liable for their acts; that, save as to two of the accused, there was no evidence that any of the accused had caused any of the injuries; that the Sessions Judge had misdirected the Jury by treating the report made by some of the accused at the Serampore *thannah* as evidence against all the accused; and that the accused had all been materially prejudiced by such misdirections.

Mr. *M. Ghose*, Mr. *Henderson* and Babu *Surendra Nath Roy* for the appellants.

The *Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

The arguments of Counsel appear sufficiently from the judgment of the High Court (BEVERLEY and BANERJEE, JJ.), which was delivered by

BEVERLEY, J.—This appeal has been preferred on behalf of fourteen Kabulis, who have been convicted by a Jury in the Court of Session at Hooghly, of offences under sections 148 and 325, read with section 149 of the Penal Code, and the appeal is preferred on the ground that the verdict is vitiated by reason of misdirection by the Sessions Judge in his charge to the Jury.

The fourteen appellants were committed to the Sessions Court upon the following charges: "*First*, that you, on or about the 20th day of April 1894, at Bhadrosar P. S., Serampore, committed murder by causing the death of Khan Ghalib, and thereby committed an offence punishable under section $\frac{302}{149}$ of the Indian Penal Code, and within the cognizance of the Court of Session. *Secondly*, that you, on or about the same day and at the same place by causing death of Khan Ghalib, committed culpable homicide,

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

and thereby committed an offence punishable under section $\frac{304}{149}$ of the Indian Penal Code, and within the cognizance of the Court of Session. *Thirdly*, that you, on or about the same day and at the same place, were members of an unlawful assembly, being armed with deadly weapons, the common object of which was, by means of criminal force, to compel Mir Azad to pay money, which he was not legally bound to do, and to use criminal force on Mir Azad and his party, and did in prosecution of the common object use criminal force, and thereby committed an offence punishable under section $\frac{148}{149}$ of the Indian Penal Code and within the cognizance of the Court of Session. *Fourthly*, that you, on or about the same day and at the same place, voluntarily caused grievous hurt to Khan Ghalib and Khan Sadik, and thereby committed an offence punishable under section $\frac{325}{149}$ of the Indian Penal Code, and within the cognizance of the Court of Session"

In the course of the trial in the Sessions Court, at the close of the case for the prosecution, the Sessions Judge, under the provisions of section 227 of the Code of Criminal Procedure, amended the third head of the charge by adding a sentence in the alternative, as to the common object of the illegal assembly. The charge as amended runs as follows :—

Thirdly, that you, on or about the same day and at the same place, were members of an unlawful assembly, being armed with deadly weapons, the common object of which was *either* (1) by means of criminal force to compel Mir Azad to pay money, which he was not legally bound to do, and (2) to use criminal force on Mir Azad and his party, *or else to punish Khan Ghalib for having enticed the wife of one Sher Ali*, and did in prosecution of the common object use criminal force and thereby committed an offence punishable under section $\frac{148}{149}$ of the Indian Penal Code and within the cognizance of the Court of Session.

It may be pointed out that none of the charges is very accurately framed. As regards the first, second and fourth heads there is nothing beyond the mere mention of section 149 of the Penal Code to show that the accused were charged with the offences therein named by virtue of the provisions of that section. In order that those charges may be intelligible, they must

be read together with the third head of the charge, in which alone the accused are directly charged with being members of an unlawful assembly acting in prosecution of a common object.

As regards the third head of the charge the mention of section 149 is meaningless, unless it is thought that where some members only of an unlawful assembly are guilty of rioting armed with deadly weapons, all the members of such assembly may be convicted under section 148 by virtue of the provisions of section 149.

The Jury acquitted the accused on the first and second heads of the charge, and convicted them on the third and fourth heads. The verdict, as recorded by the Sessions Judge, runs as follows :—

"*Verdict of the Jury.*"

"On the first charge, that of murder, we find all the accused not guilty."

"On the second charge, that of culpable homicide, we find the accused not guilty."

"On the third charge, that of rioting armed with deadly weapons, we find all the accused guilty."

"On the fourth charge, that of voluntarily causing grievous hurt, we find all the accused guilty."

Mr. Ghose contends that this verdict is vitiated on three grounds which may be shortly stated as follows :—

(1) That the Sessions Judge misdirected the Jury by adding to the third head of the charge an alternative allegation as to the common object of the unlawful assembly, and leaving it open to the Jury to convict on that altered charge, although there was no evidence on the record in support of such allegation.

(2). That the Sessions Judge misdirected the Jury in allowing them to treat as evidence in the case (i) the deposition of Bepin Behary Soor before the committing Magistrate, and (ii) the complaint of one of the accused at the Serampore *thannah.*

(3). That the Sessions Judge was wrong in treating as one of the admitted facts in the case the alleged giving of information of the intended attack at the Bhadresar outpost on the morning of the day of the occurrence.

We will deal with the two latter points first.

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

As regards the deposition of Bepin Behary Soor, it appears that the witness was ill with smallpox at the time of the trial, and the Sessions Judge, therefore, allowed his deposition before the committing Magistrate to be put in evidence under the provisions of section 33 of the Evidence Act. The witness was not cross-examined before the Magistrate. It is contended on the authority of the case of *Pyari Lall* (1), that the deposition was not admissible, and we are of opinion that the contention is well founded. But at the same time, having regard to the provisions of section 537 of the Code of Criminal Procedure, we are not prepared to say that its improper admission is sufficient ground for a new trial. The witness merely deposes to the fact of an affray between certain Kabulis, none of whom he could identify. There is plenty of other evidence to the same effect, and it cannot be supposed that this deposition had any effect on the verdict of the Jury as bearing on the guilt or innocence of any of the accused. See the concluding remarks of their Lordships of the Privy Council in *Makin* v. *Attorney General of New South Wales* (2).

As regards the complaint made by one of the accused at the Serampore Police Station, it has been referred to by the Judge in his charge as tending to discredit the story told by six of the accused. That story was that the affray arose out of the refusal of Wafadar Khan and his party to partake of *sherbet* at the hands of Khan Sadik. The complaint at the Serampore Police Station was made by one of the six accused who set up this story, and it was wholly silent as to that incident or as to the presence of Khan Sadik at the time of the affray. We think that the omission to mention these circumstances was a relevant fact under section 11 of the Evidence Act as affecting the truth or otherwise of the story told by the six accused. And as regards the other accused the complaint does not seem to have been used as evidence against them, and it is not clear to us that they have been prejudiced by its admission in evidence in any way. They are not mentioned in the complaint, and the Sessions Judge seems to have told the Jury that their defence was not the same as that of Wafadar and the five other accused who adopted his story.

(1) 4 C. L. R., 504. (2) L. R. [1894] A. C., 57.

It is not quite correct to say that the Judge treated the information given at the Bhadresar outpost on the morning of the 20th April as an admitted fact in the case. On the contrary, the Judge speaks of it as a fact depending on the evidence of the Sub-Inspector Akhoy Kumar Chatterjee, and although he does intimate his own opinion that it is a fact placed beyond all reasonable doubt, he nevertheless discusses the evidence of the Sub-Inspector and his diary at length, and expressly leaves it to the Jury to say whether or not they believe his evidence.

We think, therefore, that the second and third grounds taken by Mr. Ghose afford no sufficient reason why we should disturb the verdict in this case.

It remains to consider whether the amendment of the third head of the charge, coupled with the remarks of the Sessions Judge thereon, amounted in law to a misdirection, and, if so, whether this Court ought to reverse the verdict and to order a new trial.

The fourteen appellants are all charged with having acted with the same common object ; and it is obvious that they could not be convicted of any offence by virtue of the provisions of section 149 of the Penal Code, unless that offence was committed in prosecution of the common object of all the accused. *Queen* v. *Surroop Chunder Paul* (1). Now the common object alleged by the prosecution was (1) by means of criminal force to compel Mir Azad to pay money which he was not legally bound to pay, and (2) to use criminal force on Mir Azad and his party.

The Sessions Judge appears to have thought that the forcible levy of the small amount of money that was in dispute was an inadequate motive for the murderous attack of Wafadar and his party. He thought that something had been concealed or not truly told, and that there were facts which seemed to point to a different motive. He accordingly amended the third head of the charge by inserting the allegation of another and a different common object, and he inserted it as an alternative. That common object so inserted was stated to be "to punish Khan Ghalib for having enticed the wife of one Sher Ali."

(1) 12 W. R., Cr., 75.

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

In dealing with this matter the Judge charged the Jury as follows :—

"The first object is that which is definitely alleged by the prosecution. The second or alternative object is not alleged by the prosecution. If, however you are convinced that the story of Wafadar and his party coming to the house and of their beating Khan Ghalib in such a way as to cause death is true, it will not be an unfair or unjust inference to make from the statements of some of the accused themselves, corroborated as it is by the evidence of some of the witnesses for the prosecution that Khan Ghalib is living with a woman who was Sher Ali's wife, and whom he is not proved to have married, that the common object of the band was to punish Khan Ghalib for enticing Sher Ali's wife. Whether you should draw that inference or not is a matter entirely for you to decide. I only point out that it is an inference that is possible on the evidence.

"I have stated that the first information given by Mir Abdullah, directly after the disturbance, differs in one particular from the story now told. The name of the person, to whom Mahomed Amir is said to have lent the money, is stated in the first information to be Afzal Khan. The public prosecutor thinks that is only a mistake for Mir Azad—a mistake caused by the difficulty of catching the exact pronunciation of names as made by these up-country men, of which you had many illustrations in Court. That is an explanation which might be accepted in default of any other, were it not for the fact that, among the persons living in Abdullah's lodging, there is one whose name is given by Mir Abdullah in Court as Mir Afzal Khan. 'Afzal Khan' is much more likely to be a mistake for Mir Afzal Khan than for 'Mir Azad.' If this view is correct, there is still greater room for doubt whether the story about Mahomed Amir entrusting Azad with the collection of his dues is correct. I have, however, before pointed out that money matters were even before the riot referred to as the cause of animosity on Wafadar's part. I have also pointed out that Mir Abdullah had hardly time for concocting an altogether false story, and that he was more likely to have distorted a true story. These considerations raised in my mind a suspicion whether the person to whom Mahomed Amir

entrusted his collections was not Khan Ghalib himself. If that were so, the variation as to Afzal and Azad would be accounted for, *viz.*, by the desire to avoid all mention of Khan Ghalib, whose adulterous intercourse, if there was such, it would be natural for his friends to endeavour to screen. It would perhaps account for the conduct on the part of Wafadar and his companions. They did not want him to collect Mahomed Amir's dues, and their object would be both to prevent him from doing so and to punish him for his behaviour. As I have said, however, this is only a suspicion, unsupported by direct evidence, and arising from some of the aspects of the case and of the evidence put forward by the prosecution. It is not inconsistent with the alternative common object alleged in the charge."

Now upon this matter Mr. Ghose contends (1) that from the verdict on this head of the charge it is impossible to say whether the Jury intended to find that the accused acted with the common object alleged by the prosecution, or with that inserted in the charge by the Judge, or with both, or some with one and some with the other; and (2) that if, and so far as, the Jury intended to find that the common object of the assembly was that inserted in the charge by the Judge, the verdict is bad, inasmuch as there is no sufficient evidence of any such common object. He contends, therefore, that the verdict must be set aside.

There can be no doubt that the Judge's proceeding in this matter was, to say the least, most unfortunate. If he was of opinion that there was ground for charging the accused with a common object, different from that alleged by the prosecution, he should have added a separate count or counts to the charge upon which a separate verdict could have been taken. Section 236 of the Code only authorises a charge in the alternative, when it is doubtful which of several offences the facts which can be proved will constitute,—not, as in this case, when there may be a doubt as to the facts which constitute one of the elements of the offence. The result of the Judge's action has been, as pointed out, to introduce uncertainty into the verdict upon a most material point, and thereby, as we think, to vitiate it. It is to be regretted that the Judge did not even take the precaution to put such questions to the Jury, under the provisions of section

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

303 of the Code, as were necessary to make it clear what their verdict was.

But Mr. Ghose further contends that the Judge was not justified in asking the Jury to use the statements of some of the accused as evidence against the others, and in charging all the accused with the common object of punishing Khan Ghalib for his adulterous intercourse upon the statements of some of the accused only and in the absence of specific evidence on the point. The Judge himself says: "You have in the first place the fact that Khan Ghalib was living with the wife of Sher Ali, a fellow-countryman of the parties. Whether Sher Ali had divorced the woman and Khan Ghalib had married her, we have no evidence to determine one way or the other; but you have this fact from the mouth of the accused themselves that Khan Ghalib's behaviour in living with Sher Ali's wife was considered by Wafadar, and the five others who admittedly accompanied him, to be adulterous, and that it aroused so much irritation and animosity in their breasts that they would consider it an insult to be offered water by Khan Ghalib's son."

It is necessary to see what the statements of the accused and the evidence in regard to this matter really amount to. In his statement before the Sessions Court, Wafadar Khan stated as follows: "Khan Sadik said to us, Drink *sherbet*. We all of us said, We won't drink at your hands. Khan Sadik said, Why not? I said, Your father has brought another man's wife without marrying her, that's the reason," and further on: "Khan Ghalib has run away with Sher Ali's wife."

Wafadar's statement was adopted as their own defence by five other of the accused, namely, by Maza Khan (3), Sap Khan (4), Latif Khan (5), Abdur Rahman (6) and Surrendaz (7), and another of the accused Sikandar Khan (8) made the following statement: "Khan Ghalib has enticed away Sher Ali's wife to this country, while his own wife, Khan Sadik's mother, is living in her own country. Wafadar is no retainer of Sher Ali. Khan Ghalib brought the woman three or four months ago. I don't know whether there was any disturbance on account of the woman." Accused No. 13 Nakibullah said: "I don't know Khan Ghalib. I have not heard that he enticed away Sher Ali's

wife." None of the other accused said anything about the matter.

As regards the witnesses for the prosecution, four of them appear to have been cross-examined on the point. Mir Abdullah said: "Khan Ghalib had a separate lodging of his own. That was because he had a wife. I don't know her name. I know Sher Ali, my wife's brother. I heard that Sher Ali put away his wife, and Ghalib Khan married her. I can't say whether that wife is at Bhadresar or has gone back to her home. Khan Sadik is the son of another wife. * * * * It is not true that the quarrel arose from the refusal of those persons to drink *sherbet* at the hands of Khan Sadik because his father was living in adultery without *nikah* with a woman."

Mir Azad said: "Khan Ghalib did not put up with us. He had a separate residence. I have heard of Malika Bibi, who lives with Khan Ghalib. I have never seen her. I don't go to Khan Ghalib's *bari*. It is not true that on the Friday I went to his dwelling and had a talk with Malika Bibi and brought Khan Ghalib into my lodging. I don't know Sher Ali who was husband of Malika Bibi. I know that Khan Ghalib brought a woman from our country. I hear she is his wife. I don't know that she is any one else's wife. * * * It is not true that Wafadar and five others came into our lodging on being invited to drink *sherbet*."

Khan Sadik says: "There was a woman living with my father. I don't know whether her name was Malika or Malka. She had been divorced by her husband and my father had married her. I was not present at the marriage. My father told me he had married her. Warrants did not come from Peshawar for their arrest. * * * My father brought the woman to Bhadresar seven or eight months before his death."

Matabdin says: "I know Malka Bibi; she is living at Bhadresar. I have never seen her in this country. I have seen her in our own country. She was the wife of Mir Abdullah's brother-in-law, Sher Ali. He was alive when I left my country. Khan Ghalib brought the woman from our country. She was living with him at Bhadresar. * * * It is considered very bad in our country for a man to run away with another man's wife."

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

This appears to be all the evidence on the point, and we think Mr. Ghose is right, therefore, when he says that there is no evidence that the attack upon Mir Abdullah's house was made with the object of chastising Khan Ghalib. Khan Ghalib's adulterous intercourse was referred to by Wafadar as being the cause of his refusing to drink *sherbet* at the hands of his son, which refusal he says was the immediate cause of the quarrel, and it is obvious that the cross-examination was directed to establish this point. It was not fair, therefore, to use a part of Wafadar's statement only and to convert a fact which he put forward in his defence into a motive for the attack. The statement, even as against those who made it, should be taken in its entirety and not a part of it only for the purpose of being turned against the accused; and, further, the statement was certainly no evidence against any of the accused other than those who made or adopted it. Yet the Judge has used it against all the accused without distinction. We agree, therefore, with Mr. Ghose that there was no evidence is support of the common object charged against the accused in the alternative allegation added by the Sessions Judge, and as the verdict of the Jury leaves it uncertain whether they did not intend to find that this was the common object which actuated the accused, that verdict is bad in law.

It is necessary, however, to consider whether, having regard to the provisions of section 423, clause (*d*) of the Code, we are bound to reverse the verdict of a Jury, unless we are of opinion that it is erroneous, or, in other words, wrong. The point was argued at the bar, and Mr. Leith, on the part of the Crown, further invited our attention to section 537 of the Code, which prescribes that, "subject to the provisions hereinbefore contained, no finding * * * passed by a competent Court shall be reversed * * * on appeal * * * on account of any misdirection in any charge to a Jury unless such * * * misdirection * * * has occasioned a failure of justice." Mr. Leith accordingly asks us to go into the evidence and to decide upon the facts whether or not the accused have been rightly convicted.

We are of opinion that it is not open to us to adopt this course, and we are not aware of any case in which it has been followed. Section 418 of the Code provides that, where the trial is by jury,

an appeal shall lie on a matter of law only. It is quite clear, therefore, that we have no power to try the accused in this appeal on matters of fact. Clause (*d*) of section 423 runs as follows: "Nothing herein contained shall authorize the Court to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him." In this clause, as it seems to us, the word "erroneous" is not to be read as meaning "wrong on the facts;" it must rather be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The effect of the clause is evidently to prevent the Appellate Court from reversing the verdict of a Jury on account of any misdirection by the Judge or any misunderstanding on the part of the Jury of the law as laid down by him, unless such misdirection or misunderstanding of the law is on a point material to the verdict, so that the verdict can be said to be tainted with error in the process by which it has been arrived at. It throws on the Appellate Court the duty no doubt of ascertaining whether the process or method which the Judge directed the Jury to follow as to the acceptance or discarding of evidence or as to the view taken of the law was erroneous on any material point, but not certainly the duty of determining for itself whether the verdict, as a conclusion of fact, was right or wrong. To hold otherwise would be tantamount to holding that an appeal would lie upon the facts from the verdict of a Jury in the face of the provisions of section 418, and that the Legislature intended to give this Court the same powers in respect to an appeal from the verdict of a Jury as it has in respect of a judgment by the Sessions Judge in a trial with assessors. In his contention that this was the object of the Legislature Mr. Leith has referred to section 307 of the Code, under which section the High Court is authorized to go into the facts. But it is to be observed that that section expressly and designedly confers upon the Court higher powers than it can exercise on appeal under the provisions of section 423.

A very similar point was recently before the Judicial Com-

1894

WAFADAR KHAN v. QUEEN-EMPRESS.

mittee of the Privy Council in the case of *Makin* v. *Attorney General for New South Wales* already referred to. In that case, the question was raised whether, under the proviso to section 423 of the Criminal Law (Amendment) Act of 1883, where the Judge who tries a case reserves for the opinion of the Supreme Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can, nevertheless, affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged. The proviso in question runs as follows: "Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated, unless for some substantial wrong or other miscarriage of justice." The Privy Council held that the words of the proviso could not be given the construction contended for. To quote the words of the Lord Chancellor: "It is obvious that the construction contended for transfers from the Jury to the Court the determination of the question, whether the evidence,—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a Jury, the judgment passed upon him is made to depend, not on the finding of the Jury, but on a decision of the Court. The Judges are in truth substituted for the Jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses, and weighing the evidence with the assistance which this affords.

"It is impossible to deny that such a change of the law would be a very serious one, and that the construction, which their Lordships are invited to put upon the enactment, would gravely affect the much cherished right of trial by Jury in criminal cases. The evidence, improperly admitted, might have chiefly influenced the Jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the Jury in view of the demeanour of the witnesses. Yet the Court might,

under such circumstances, be justified, or even consider themselves bound to let the judgment and sentence stand.

"These are startling consequences, which strongly tend in their Lordships' opinion to show that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

"Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the Jury have, notwithstanding objection, been invited by the Judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them.

"In their Lordships' opinion substantial wrong would be done to the accused, if he were deprived of the verdict of a Jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence."

For these reasons we are of opinion that, having come to the conclusion that the verdict of the Jury in this case has been vitiated by the misdirection of the Sessions Judge, we have no option but to set aside that verdict and to direct that the accused be retried.

Appeal allowed and new trial ordered.

H. T. H.

CRIMINAL REFERENCE.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

RAMJEEVAN KOORMI (COMPLAINANT) *v.* DURGA CHARAN SADHU KHAN (ACCUSED.)*

1894 *July* 4.

Criminal Procedure Code (Act X of 1882), section 560—Compensation—Imprisonment in default of payment of compensation—Distress.

The operation of section 560 of the Code of Criminal Procedure is restricted to cases instituted by "complaint" as defined in the Code or upon information given to a police officer or a Magistrate, and consequently that section has

* Criminal Reference No. 170 of 1894, made by F. W. Duke, Esq., Officiating District Magistrate of Hooghly, dated the 20th June 1894, against the order passed by Moulvie A. K. M. Abdus Sobhan, Deputy Magistrate of Hooghly, dated the 29th May 1894.

1894

RAMJEEVAN KOORMI v. DURGA CHARAN SADHU KHAN.

no application to a case instituted on a police report or on information given by a police officer.

Quære—Whether under the section a Magistrate has power to make an order for imprisonment in default of payment of the compensation awarded?

A police constable arrested a carter and charged him before a Magistrate with an offence under section 34 of Act V of 1861. The Magistrate acquitted the accused and directed, under section 560 of the Code, that the police constable should pay him Rs. 20 as compensation or undergo simple imprisonment for a fortnight.

Held, that as the section had no application to the case, the order was illegal, being made without jurisdiction.

Held, further, that even if the Magistrate had power under the Code to pass an order for imprisonment in default of payment of compensation awarded under section 560, it was illegal to pass such an order until some attempt had been made to levy the amount in the manner provided by section 386 for the levying of a fine.

THIS was a reference by the District Magistrate of Hooghly, under section 437 of the Code of Criminal Procedure, questioning the legality of an order passed by a Deputy Magistrate under the provisions of section 560 of that Code, directing a police constable, who had arrested and charged a carter with an offence under clause 3, section 34 of Act V of 1861, and who had failed to prove such charge, to pay the carter Rs. 20 as compensation or undergo simple imprisonment for a fortnight.

The reference was in the following terms:—

"I have the honor, under section 437 of the Criminal Procedure Code, to forward, for the orders of the Hon'ble Court, the proceedings in a case under section 560 of the Criminal Procedure Code against Ramjeevan constable tried by Moulvie A. K. M. Abdus Sobhan, Deputy Magistrate with first class powers.

"The proceedings form part of the record (*Empress* v. *Durga Churan Sadhukhan*) under section 34 of Act V of 1861, in which the said Ramjeevan had arrested and given evidence against the accused.

"The facts are as follows: The constable found a cart untended in the Khurna Bazar of Chinsurah, and when the driver appeared, arrested him and caused his prosecution under clause 3 of section 34 of Act V of 1861.

"The Deputy Magistrate found that the accused's absence from his cart was brief and did not constitute an offence under the sec-

tion quoted, and accordingly acquitted him. I think that his finding that the admitted fact of the carter leaving his cart untended, in the circumstances of time and place, did not amount to an offence was wrong, but I do not propose to trouble the Court with this trivial matter save in so far as it affects the question of compensation.

"The Deputy Magistrate, however, also drew up a proceeding under section 560 of the Criminal Procedure Code, and ordered the arresting constable to pay Rs. 20 compensation to the accused, or to undergo simple imprisonment for a fortnight in default.

"The points I would submit for the consideration of the Court are:—

"(1) Whether section 560 of the Criminal Procedure Code is applicable at all to a police officer arresting an accused person for a cognizable offence?

"(2) Whether the order imposing 15 days' imprisonment in default of payment is legal?

"(3) That the Deputy Magistrate's proceeding is bad inasmuch as no objection has been recorded as required by section 560, clause (1) *a*, although one was made as appears from the proceeding.

"(4) That in any case the compensation is excessive and totally out of proportion to the circumstancess of the parties, to any inconvenience suffered by the accused, or to any wrong-doing committed by the constable.

"As regards the first point I would only say that it is of the first importance that it should be decided whether section 560 is applicable to a police officer arresting for an offence for which he has power to arrest. The words of the section are, "in any case instituted by complaint as defined in this Code, or upon information given to a police officer, or to a Magistrate." The case was instituted neither on complaint nor upon information given. The accused was arrested by the police officer, in whose view the offence was committed, and therefore there was neither complaint nor information. The section is evidently framed so as to exclude police officers acting under colour of their duty from its operation.

1894

RAMJEEVAN KOORMI v. DURGA CHARAN SADHU KHAN.

"As regards the second point, the words of the section, clause 2, has provided that if it (the fine) cannot be recovered the imprisonment to be awarded shall be simple.

"Imprisonment is intended to be resorted to as a final measure if the compensation *cannot be recovered* by other means. An order for imprisonment made concurrently with the order for compensation, involving as it does immediate imprisonment if the compensation is not paid on the spot, seems to be bad. It is clearly intended that an attempt shall first be made to effect recovery by distraint.

"I have already noted that the Deputy Magistrate has not recorded the objections offered by the constable as he was bound to do. He has contented himself with saying that the constable could not show any good cause.

"Lastly, as regards the amount of compensation, the Deputy Magistrate has found that the accused left his cart for a while in the Khurna Bazar, a narrow and crowded street. This certainly appears to be an offence under the 3rd clause of section 34 of Act V of 1861, but the Deputy Magistrate thinks not. He finds fault because there is not corroborative evidence of actual damage or obstruction, though under the law only the probability of damage or obstruction is required, and these might have been sufficiently inferred from the circumstances of the case; and in any case it is not the arresting constable who is responsible for the production of evidence. However, he considers the constable acted without discretion in making the arrest. Admitting that he did, and that the accused is entitled to compensation, there is no reason for compensation of Rs. 20. The accused was detained from his arrest to his acquittal between 8 A.M. and 4 P.M., 8 hours. The accused was detained in custody, because he could not furnish bail, but the constable is not responsible for that. His loss of time allowing for his carts and bullocks may be estimated at not exceeding Rs. 1. With three times that sum he would have been amply compensated for all the loss and inconvenience he suffered. He had no legal nor any other expenses in the case.

"The amount again is nearly equal to three months' pay of the constable, and is as excessive for him to pay as unnecessary for the

complainant to receive. It is in fact a penal or vindictive fine and not compensation."

Ramjeevan Koormi did not appear at the hearing of the reference.

The *Deputy Legal Remembrancer* (Mr. *Leith*) at the request of the Court on behalf of the Crown :—As regards the question as to whether under section 560 it is competent for a Court to award imprisonment in default of payment of compensation at the time of ordering compensation to be paid, I contend that it is within the Court's power to do so. By section 250 of Act X of 1882, repealed by Act IV of 1891, as well as by section 560, compensation is made recoverable "as if it were a fine." By section 209 of Act X of 1872, and by section 270 of Act XXV of 1861, this was not so. As to recovery of fines see section 33 and section 389 of Act X of 1882. Imprisonment is ordered as "a process for enforcing the payment of a fine" [see *Empress* v. *Asghar Ali* (1), and section 552 and Sch. V, Form XXX of Act X of 1882, and also section 69 of the Penal Code], and must therefore be equally a process for the recovery of compensation awarded under the section.

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows :—

One Durga Charan Sadhu Khan was arrested without warrant by constable Ramjeevan for an offence under clause 3 of section 34 of Act V of 1861. The Deputy Magistrate, who tried the case, acquitted Durga Charan, and under the provisions of section 560 of the Code of Criminal Procedure ordered the constable "to pay Rs. 20 as compensation to the accused, or undergo simple imprisonment for a fortnight."

The District Magistrate has asked us to exercise our powers of revision in the case on four grounds : (1) That section 560 of the Code is not applicable to a police officer arresting an accused person for a cognizable offence ; (2) that the order imposing imprisonment in default of payment is illegal ; (3) that sub-section (1) proviso (*a*) has not been complied with ; (4) that the compensation awarded is excessive and out of proportion to the circumstances of the parties, to any inconvenience suffered by the accused, or to any wrong-doing committed by the constable.

(1) I. L. R., 6 All., 61.

1894

RAMJEEVAN KOORMI v. DURGA CHARAN SADHU KHAN.

On the first ground, we think it is quite clear that the order complained of is illegal. Section 191 of the Code authorizes certain Magistrates to take cognizance of an offence—(*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a police report of such facts; (*c*) upon information received from any person, *other than a police officer*, or upon his own knowledge or suspicion that such offence has been committed.

"Complaint" is defined in section 4, clause (*a*), and that definition in express terms excludes the report of a police officer. The operation of section 560 is restricted to cases instituted "by complaint as defined by this Code or upon information given *to* a police officer or to a Magistrate." It is clear that it will not apply to a case instituted on a police report or on information given *by* a police officer. The Deputy Magistrate therefore had no jurisdiction to make any order under that section in this case, and the order is for that reason illegal.

As regards the order for imprisonment in default of payment of the compensation, it is to be observed that the section itself does not expressly authorize the Magistrate to award such imprisonment. All that the section says on this point is contained in sub-section (2) which runs as follows:—

"Compensation, of which a Magistrate has ordered payment under sub-section (1), shall be recoverable as if it were a fine.

"Provided that, *if it cannot be recovered*, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs."

By section 209 of the Code (Act X) of 1872 authority was expressly given to award imprisonment if the compensation could not be realized. The third clause of that section runs as follows:—

"The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant which may be found within the jurisdiction of the Magistrate of the District, and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, *and if the sum awarded cannot be realized by*

means of such distress by imprisonment of the complainant in the civil jail for any time not exceeding thirty days unless such sum is sooner paid."

In the Code of 1882, the wording of the corresponding section, *viz*, section 250, now repealed, was altered, and the words expressly authorizing the levy of the fine by imprisonment were for some reason omitted, nor have they been reproduced in section 560 of the Code, which now takes the place of section 250. Mr. Leith, whom we have heard on this point, suggests that imprisonment is to be regarded as one of the ordinary modes of recovery of a fine, but we are not aware of any provision of the law under which a fine is recoverable by imprisonment. Section 386 prescribes that a fine, if not paid, may be levied by distress and sale of any moveable property belonging to the offender, but is silent in respect of any other mode of recovering the fine. The power to award imprisonment, in default of payment of a fine, in the case of an offence, is contained in section 64 of the Penal Code, but that section only refers to cases in which a person is sentenced to pay a fine *for an offence* and will not apply to an order to pay compensation. Similarly, section 33 of the Code of Criminal Procedure only relates to cases in which imprisonment, in default of payment of a fine, is *authorized by law* in case of default.

As section 560 of the Code stands, therefore, we think it extremely doubtful whether the Deputy Magistrate had any jurisdiction at all to make an order for imprisonment in default of payment of the compensation. But, however that may be, we think it clear that such an order could not be made in the terms in which it has been made in this case. Under section 209 of the Code of 1872, the order for imprisonment could only be made if the compensation could not be realized by distress, and the words of section 560 of the present Code are to the same effect—"if it cannot be recovered." See also the cases of *Bisheswar Shaha* v. *Bishwambhur Sircar* (1), and *Queen* v. *Gopai* (2).*

Therefore, even if the Deputy Magistrate had jurisdiction

(1) 23 W. R. Cr., 64. (2) 2 N. W. P., (All.) H. C., 430.

* See the case of *Queen-Empress* v *Kutrapa*, I. L. R., 18 Bom., 440.—*Ed.*

1894

RAMJEEVAN KOORMI v. DURGA CHARAN SADHU KHAN.

to make an order for imprisonment, it was illegal to make such an order until some attempt had been made to levy the amount.

For these reasons, we think that the order of the Deputy Magistrate is bad in law; and we set it aside accordingly. We think it unnecessary to consider the other grounds urged by the District Magistrate.

H. T. H. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

1894 *July* 31.

SHITAL MONDAL (DEFENDANT) *v.* PROSSONNAMOYI DEBYA AND OTHERS (PLAINTIFFS.)*

Bengal Tenancy Act (VIII of 1885), section 30, clause (a)—Suit for enhancement of rent—Prevailing rate. Meaning of—Average rate.

The words "prevailing rate" in section 30, clause (*a*) of the Bengal Tenancy Act, mean, not the average rate of rent, but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859.

THE facts of this case and the points material to the report sufficiently appear from the judgment of the Judge which confirmed the Munsif's decision and which was as follows:—

"This is an enhancement suit brought under the provisions of section 30 (*a*) and section 3 of the Bengal Tenancy Act, against an occupancy ryot. The defendant holds 19½ *bighas* at a *jama* of between Rs. 6 and Rs. 7. The plaintiff claimed enhancement to a rate of Rs. 2 per *bigha*. The Munsif decreed an enhanced rate of Rs. 1-8 per *bigha*, and the defendant now appeals. The question of enhancement is the sole question taken in appeal. The first ground of appeal to the effect that the lands are 'protected from enhancement' is admitted by the appellant's pleader to mean merely that defendant has held a long time at the old rate; he admits for his client that there is no legal protection.

"The Munsif's judgment is based mainly, if not entirely, upon the report of a Commissioner, who was appointed under the provisions of section 31 (6)

* Appeal from Appellate Decree No. 167 of 1894, against the decree of C. A. Wilkins, Esq., District Judge of 24-Perganas, dated the 20th of November 1893, affirming the decree of Babu Tarak Chunder Dass, Munsif of Basirhat, dated the 6th of September 1892.

of the Tenancy Act to hold a local enquiry. That report, with the evidence taken by the Commissioner, are evidence in the suit, and form part of the record (section 393 of the Civil Procedure Code).

"The Commissioner examined sixteen witnesses who, as is inevitable in such cases, give very discrepant accounts as to what is the prevailing rate in the village. In order to push his enquiry as far as possible, he examined witnesses as to the rents paid in kind; he reduced these rents to cash at a fair rate, and came to the conclusion that, upon the whole, the prevailing rate for such lands as those in suit was Rs. 1-8 per *bigha*.

"It is contended for the appellant that the Commissioner has calculated the prevailing rate solely on the comparison made with lands paying rent in kind. This is not so.

"The question is whether the evidence justifies the conclusion that the 'prevailing rate' in the village for similar lands is Rs. 1-8. That evidence seems to me to show that there are several rates, but I can find nothing which proves that any one rate prevails more than another—a rate in fact which is paid by the majority of the ryots in the village. Nor is it necessary to find this under the present law; for, in order to determine the 'prevailing rate,' it is permissible, and indeed necessary, to have regard to the 'rates' generally paid; in fact clause (*a*), of section 31, presupposes the existence of more rates than one.

"Still the Act does not allow the Courts to strike an average of different rates current in the village, in order to ascertain the enhanced rate payable, except in very special cases. Such a special case would be where a landlord proves that the lands are held at a rent below their value, and when a distinctly prevailing rate cannot be found on account of the currency of different and nearly equal rates. In such a case the Court might justly take an average—*Dena Gazee* v. *Mohinee Mohun Doss* (1).

"What does the evidence in the present case show? To my mind it does not go beyond asserting that different ryots held at different rates; it does not go so far as to establish that any one rate is, or that more rates than one are, prevalent in the village. No two witnesses agree. The landlord does not produce his *jamabandi* to help to a correct decision, and all that we have to rely upon is the oral evidence in the case, and that evidence shows that there are several rates current, (although none in particular is 'prevalent.') What I gather from the evidence is that originally the village rate was very low; but that for several years past fresh settlements have been made at enhanced rates, varying from Re. 1 to Rs. 1-8 and more. This seems therefore one of those special cases in which under the old law the Court would be justified in striking an average in order to determine the enhanced rent payable by the defendant. It does not appear to me that the present law materially differs from that laid down in the later decisions of the High

(1) 21 W. R., 157.

1894

SHEFAL MONDAL v. PROSSONNAMOYI DEBYA.

Court under the old law. The Courts are to 'have regard to the rates generally paid,' during the three years preceding the institution of the suit. I can find no reasonable interpretation of these words other than this, that the Courts, looking to what other tenants of similar lands in the village have been paying, shall determine what the defendant will in future pay, and shall not necessarily say that that rent is to be enhanced up to the limit of any of the prevailing rates.

"Acting upon this principle, I find that the decision of the Munsif is reasonable and proper, and I accordingly confirm his decree and dismiss this appeal with costs."

From this decision the defendant appealed to the High Court, mainly on the ground that the Judge having held that there was no prevailing rate in the village, and the plaintiff therefore having failed in his opinion to prove the "prevailing rate," within the meaning of clause (*a*) of section 30 of the Bengal Tenancy Act, the suit ought to have been dismissed; and that the Judge was wrong in law in striking an average of the rates found current in the village.

Babu *Grish Chunder Chowdhry* for the appellant.

Babu *Opendra Chunder Bose* and Babu *Shib Prosunno Bhuttacharji* for the respondents.

The judgment of the Court (O'KINEALY and HILL, JJ.) was as follows:—

This is an appeal from the decision of the District Judge of the 24-Perganas. It arises out of an action under section 30 of the Rent Law, seeking to enhance the rent of a tenant under clause (*a*) of that section, which says that "the landlord of a holding may sue for enhancement if the rate of rent paid by the ryot is below the prevailing rate paid by occupancy ryots for land of a similar description and with similar advantages in the same village, and that there is no sufficient reason for his holding at so low a rate."

In the Court below the Judge came to the conclusion that the plaintiff had not succeeded in proving any prevailing rate; but upon the authority of a case of *Dena Gazee* v. *Mohinee Mohun Doss* (1), he held that he might, in this particular case, take the average of the different rates current in the village and treat that as the prevailing rate. That, no doubt, was a peculiar case;

(1) 21 W. R., 157.

but with the exception of that case, in all other cases, from the case of *Shadhoo Singh* v. *Ramanoograha Lall* (1) upwards, the rate actually paid and current in the village has always been taken to mean the "prevailing" and not the "average" rate. In the new Act the words "prevailing" and "average" are used in different senses in different sections. In section 30, for instance, reference is made to the "prevailing rate;" in section 32 reference is made to "average prices" and not "prevailing prices;" in section 40, sub-section 4, clause (*a*) the terms "average money rent," and in clause (*b*) the "average value of the rent" are mentioned as distinct from "prevailing rate." We think, therefore, that the words "prevailing rate" in this case are used in the same sense in which they are used in the earlier cases under Act X of 1859.

The result is that this appeal is decreed, the decision of the lower Appellate Court is set aside, and the plaintiff's suit dismissed with costs in all the Courts.

J. V. W. *Appeal allowed.*

Before Mr. Justice Ghose and Mr. Justice Gordon.

RAJA SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* KOOLDIP SINGH AND ANOTHER (DECREE-HOLDERS.)*

1894 *July* 27.

Mesne profits—Execution of decree in suit for possession—Execution pending appeal—Reversal of decree on appeal and restoration of possession—Right to restitution of mesne profits—Civil Procedure Code (Act XIV of 1882), sections 244, 583—Separate suit.

R brought a suit against *K* for possession of certain land, and obtained a decree. *K* appealed, but pending the appeal *R* took possession of the land in execution of his decree. *K* was successful in the appeal, and was restored to possession in execution of the decree of the Appellate Court, which, however, was silent as to mesne profits. In an application by *K* for mesne profits for the period during which *R* was unlawfully in possession, *Held* that *K* was entitled to restitution of such mesne profits in the execution proceedings, and it was not necessary for him to bring a separate suit to recover

* Appeal from Order No. 256 of 1893, against the order of H. Holmwood, Esq., District Judge of Bhagulpore, dated the 3rd of June 1893, reversing the order of Babu Bebin Bepary Mukerjee, Munsif of Begusarai, dated the 18th of April 1893.

(1) 9 W. R., 83.

1894

RAJA SINGH v. KOOLDIP SINGH.

them. He was entitled to such restitution, either by reason of the power conferred by section 583 of the Civil Procedure Code upon the Court which passed the decree, [*Kalianasundram* v. *Egnavedeswaru* (1)], or by reason of the inherent right that the Court has to order the restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal [*Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meeah* (2.)]

IN this case Raja Singh and others brought a suit for possession of some immoveable property against Kooldip Singh and others, and obtained a decree. The defendants in that case appealed from that decree, but, before the disposal of the appeal, the plaintiffs obtained possession of the land in execution of the decree they had obtained. The appeal was eventually decided in favour of the three defendants, Kooldip Singh and others, who, under the decree of the Appellate Court, recovered possession of the land ; and they now claimed mesne profits for the time they were kept out of possession. The decree of the Appellate Court was silent as to the mesne profits.

The only question material to this report was whether such mesne profits could be recovered in execution of the decree, or whether a fresh suit must be brought for them.

The Munsif relied on the cases of *Ram Ghulam* v. *Dwarka Rai* (3), and *Azizuddin Hossein* v. *Ramanugra Roy* (4) ; and held that the question could not be tried in the execution proceedings.

On appeal the Judge said :—

"In *Azizuddin Hossein* v. *Ramanugra Roy* (4), the learned Judges say, 'we were at first disposed to think that we ought to send this case to a Full Bench, because the balance of our judgment was rather to agree with the Allahabad case than with the cases decided by Division Benches of this Court ; but after hearing the learned vakil for the respondents, we are satisfied that there is no necessity for our so referring this case, indeed not only that there is no necessity but that we ought not to do it.' The law in Bengal, therefore, remains as it was laid down in the case of *Lati Kooer* v. *Sobadra Kooer* (5), in which all the previous decisions were considered, and the principle enunciated by the Privy Council in *Lilanand Singh* v. *Luckimpur Singh* (6) that the right to mesne profits was consequential on the possession given by the decree, was approved. Sir Barnes Peacock is quoted as saying : 'The decree of reversal necessarily carries with it the right

(1) I. L. R., 11 Mad., 261.
(2) I. L. R., 14 Calc., 484.
(3) I. L. R., 7 All., 170.
(4) I. L. R., 14 Calc., 605.
(5) I. L. R., 3 Calc., 720.
(6) 5 B. L. R., 605 : 13 Moo. I. A., 490

to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed'; but the actual ruling in this case is that upon the application for execution of an Appellate Court's decree reversing a previous decree, it was competent for the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived of by such enforcement. The law, therefore, appears to be that the recovery of mesne profits in such cases may be made either under section 244 of the Civil Procedure Code, or by regular suit, and the Munsif's judgment that the question cannot be tried in the execution proceedings is consequently wrong, and must be reversed. The appeal is decreed with costs."

Raja Singh and others, the judgment-debtors, appealed to the High Court, on the ground that the Judge should have held that the mesne profits claimed were not recoverable in execution but only by a separate suit.

Dr. *Trailakya Nath Mitter*, and Baboo *Bamapodo Mukerjee*, for the appellants.

Dr. *Rash Behari Ghose*, and Baboo *Dwarkanath Chuckerbutty*, for the respondents.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows :—

The facts out of which this appeal arises are shortly these : One Raja Singh and some other individuals brought a suit against Kooldip Narain Singh and others for recovery of possession of certain property, and obtained a decree in the Court of first instance. The defendants appealed to the higher Court, but during the pendency of the appeal the plaintiffs took possession of the property in question in execution of the decree of the first Court. The appeal was ultimately decreed in favour of the defendants, and thereupon they were restored to possession ; and they subsequently applied to the Court for recovery of mesne profits from the plaintiffs for the period during which the latter were unlawfully in possession.

The contention that seems to have been raised in the Courts below was whether the defendants, decree-holders, were entitled to recover mesne profits from the plaintiffs in execution of the decree of the Appellate Court under section 244 of the Code, or whether their only remedy was not to bring a separate suit for that relief.

1894

RAJA SINGH v. KOOLDIP SINGH.

The learned District Judge has held, in reversal of the order of the Court of first instance, that the mesne profits in question might be recovered either under section 244 or by a separate suit; and he has accordingly held that the defendants, decree-holders, were entitled to recover mesne profits from the plaintiffs in execution of the decree of the Appellate Court.

Several cases were referred to by the learned vakils on either side in the course of the argument before us, and we have consulted various other cases upon the subject.

In the case of *Hurro Chunder Roy Chowdhry* v. *Sooradhoonee Dabea* (1) decided by a Full Bench of this Court, Sir Barnes Peacock observed that upon a decree for possession being reversed in appeal by the Appellate Court, it is competent to the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced was deprived by such enforcement. The immediate question in that case was no doubt different from that which we have to consider in the present case; but it was such that the Full Bench had necessarily to consider what may be the relief which a successful appellant is entitled to by way of restitution. Sir Barnes Peacock, in the course of his judgment, observed as follows: "The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorized the lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived by reason of its having been enforced. The Sudder Court ordered that the lands were to remain with the plaintiff. It did not order the lands to be restored to her; but the necessary consequence was that restitution was to be made, and restitution of the lands was made by the Principal Sudder Amin without any objection. There seems to be no reason why he should not have restored to the plaintiff the rents and profits of which she was deprived during the time she was kept out of possession of her land under the erroneous decree."

(1) B. L. R., Sup. Vol., 985; 9 W. R., 402.

This principle seems to have been accepted and followed in *Shib Narayan Pohraj* v. *Kishore Narayan Pohraj* (1); *Hamida* v. *Bhudhun* (2); *Ununt Ram Hazrah* v. *Kuralee Pershad Mistree* (3); *Lati Kooer* v. *Sobadra Kooer* (4); and *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meeah* (5). And it seems to have been uniformly held in this Court that a Court reversing a decree, under which possession of property had been taken, has power to order restitution of the property taken possession of, and with it any mesne profits which may have accrued during such possession.

The learned vakil for the appellant, however, relied upon the Full Bench decision of the Allahabad High Court in the case of *Ram Ghulam* v. *Dwarka Rai* (6), which no doubt may at first sight appear to have taken a contrary view, but upon closer examination it will be found that it is not so. There, the plaintiff had sought for possession of certain immoveable property, and obtained a decree, and in execution of that decree obtained possession. The decree was subsequently reversed on appeal by the defendant. The decree of the Appellate Court was silent in respect of mesne profits, which the plaintiff had received while in possession, and the defendant instituted a suit to recover such profits. The question which seems to have been discussed in that case was whether the suit was not barred by section 244 of the Code of Civil Procedure, and it was held by Petheram, C.J., and the other Judges who composed the Full Bench, that the suit was not so barred. The Chief Justice, however, expressed a doubt whether the defendant, the successful appellant, could have recovered mesne profits in execution of his decree, and he was of opinion that, although the question before the Court arose out of the decree, it did not relate to "the execution, discharge or satisfaction of the decree," within the meaning of section 244. What we understand was really decided in that case was that the suit for the recovery of the mesne profits was not barred by the provisions of section 244 of the Code. The case

(1) 1 B. L. R., A. C., 146; 10 W. R., 131.
(2) 20 W. R., 238.
(3) 23 W. R., 441.
(4) I. L. R., 3 Calc., 720.
(5) I. L. R., 14 Calc., 484.
(6) I. L. R., 10 All., 170.

1894

RAJA SINGH v. KOOLDIP SINGH.

of *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (1), to which we have already referred, came before Petheram, C.J., and Ghose, J.; and the Chief Justice, in delivering the judgment of the Court, and with reference to the Full Bench decision of the Allahabad High Court in the case of *Ram Ghulam* v. *Dwarka Rai* (2), observed as follows: "A decision of the Allahabad High Court, in which I took part, has been cited, in which it was held that the section of the Code does not prevent the person who has been wrongfully deprived of his property by this proceeding from bringing an action to recover the profits during the time he has been wrongfully kept out of possession, and speaking for myself I still adhere to the opinion which I then expressed that such an action may be maintained." And later on, with reference to the question whether the defendant in that suit was entitled by way of restitution to the mesne profits, which the plaintiff had recovered during the time when he was in unlawful possession, the learned Chief Justice observed as follows: "But if such an action can be maintained, it by no means follows that the Court, which has given possession under the wrong decree, which has afterwards been cancelled, cannot order restitution of the property which has been wrongfully taken, and any mesne profits which may have been derived from it in the meantime. Speaking for myself I do not think that this restitution is a proceeding which comes within the meaning of section 244 of the Code of Civil Procedure, but I think it is an inherent right in the Court itself to prevent its proceedings being made any cause of injustice or oppression to any one, and therefore it seems to me that that inherent right does exist, and that the Court has power under that inherent right to order restitution of the thing which has been improperly taken, and as a part of that power it must have the right and the power to order restitution of everything which has been improperly taken. If they have that power, they have the power not only to order restitution of the property itself, but restitution of any proceeds which have been improperly taken during the time that it was in the possession of the person who was not entitled to it. These proceeds which have been received

(1) I. L. R., 14 Calc., 484. (2) I. L. R., 10 All., 170.

are the mesne profits of the property, and, therefore, it seems to me, it being admitted that there is a power in the Courts to order restitution of the property, it must follow that they have the power to order restitution of the mesne profits."

The result in that case was that the defendant was held entitled by way of restitution to obtain the mesne profits which the plaintiff had realized during the time that he was in unlawful possession of the property under the decree which was set aside on appeal.

We may in this connection refer to two other cases which were decided by the Privy Council. In *Rodger* v. *Comptoir d'Escompte de Paris* (1) where money had been paid under a decree which was subsequently reversed on appeal, the Privy Council held that the successful appellant was entitled to a refund of the money with interest for the period during which the said money was unlawfully in the hands of the plaintiff. The Judicial Committee in delivering judgment observed as follows: "It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will, by reason of an act of the Court, have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at, unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld." And later on they observed:

(1) L. R., 3 P. C., 465.

1894

RAJA SINGH v. KOOLDIP SINGH.

"Their Lordships have reason to believe that the practice of the Courts in India, when there has been a reversal in this country, and when money has been ordered in India to be paid back in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found in favour of a restitution of the money with interest." In the case of *Shama Pershad Roy Chowdhry* v. *Hurro Pershad Roy Chowdhry* (1), where money had been paid under a decree which was reversed on appeal, it was held that it was recoverable either by a new suit or by summary process, and the Judicial Committee ordered the money to be refunded, with interest from the date of payment, to the plaintiff. These cases no doubt are not parallel to the case we have before us, but the principle which underlies them is, we think, equally applicable to this case.

It may, we think, be well doubted whether this restitution could be had under the provisions of section 244 of the Code of Civil Procedure. Indeed, we are inclined to think that the wording of that section does not cover it There is, however, another section of the Code of Civil Procedure under which the restitution might probably be had, and that is section 583. It runs as follows: "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits." And we observe that in the case of *Kalianasundram* v. *Eynavedeswara* (2), the Madras High Court has approvingly quoted the decision of this Court in *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (3), and has held that mesne profits could be recovered in execution by way of restitution under section 583 of the Code. We also observe that the Bombay High Court, in the case of *Balvantrav Oze* v. *Sadrudin* (4), has held that the procedure provided by section

(1) 10 Moo. I. A., 203.
(2) I. L. R., 11 Mad., 261.
(3) I. L. R., 14 Calc., 484.
(4) I. L. R., 13 Bom., 485.

583 of the Code is not confined to cases where the restitution desired is provided for by the decree itself.

1894

RAJA SINGH v. KOOLDIP SINGH.

It follows from all the cases that we have referred to that the successful appellant is entitled by way of restitution to the mesne profits recovered by the plaintiff during the time of his unlawful possession, by an application in the suit itself, whether it be by reason of the power conferred upon the Court which made the decree under section 583, as held by the Madras High Court, or by reason of the inherent right that the Court has to order restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal, as held by Petheram, C.J., in *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (1). As we have already said the cases in this Court are all in one way, and therefore it is now too late to ask us to disturb the current of rulings upon the subject.

The result is that this appeal will be dismissed with costs.

J. V. W. *Appeal dismissed.*

PRIVY COUNCIL.

UMRAO BEGUM (PLAINTIFF) v. IRSHAD HUSAIN AND ANOTHER (DEFENDANTS.)

P. C.*
1894
June 7, 9, & 30.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates Act (I of 1869), section 22, sub-sections 4 and 7—Taluk inherited by a daughter's son—Revivor of an appeal which had abated.

The *taluk* to which the succession was in dispute was one of those entered in the first and second of the lists prepared in conformity with section 8 of the Oudh Estates Act, 1869, descending to a single heir by primogeniture. The last *talukdar* died without leaving a son, but left a widow, and by a former wife two daughters of whom the elder had a son. The widow's claim to an estate for life, under sub-section 17 of section 22 of the above Act, was met by the defence that the daughter's son, having been treated by his maternal grandfather in all respects as his own son, was, under sub-section 4, entitled to inherit the *taluk*. The Courts below decided in his favour.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR R. COUCH.

(1) I. L. R., 14 Calc., 484.

1894

UMRAO BEGUM v. IRSHAD HUSAIN.

Held, that the Courts below were right as to the treatment of the daughter's son, in regard to sub-section 4. *Pertab Narain Singh* v. *Subhao Kooer* (1) did not show that sub-section 4 had been construed to require evidence on that point attaining to any special degree.

Leave to revive the widow's appeal, which abated on her death before the hearing, was obtained by the younger daughter of the deceased *talukdar*, one of the defendants; she being next among those who would have a claim to inherit the *taluk* in succession should the appeal be decreed.

Held, that the appellant by revivor must be restricted to the suit for the *taluk*, and could not advance, on this appeal, any claim of her own which she might have preferred in a suit to inherit property which had belonged to the deceased other than the *talukdari* estate.

APPEAL from a decree (21st March 1888) of the Judicial Commissioner of Oudh, affirming a decree (25th April 1887) of the District Judge of Lucknow.

This appeal related to a *taluk* named Narauli in the Bara Banki district, to which the succession was regulated by the Oudh Estates Act, 1869, the *taluk* having been entered in lists I and II, prepared in conformity with section 8, as one of those which, on and before the 13th February 1856, ordinarily devolved upon a single heir. The last owner had died without a son, leaving a widow, and two daughters by a former wife, the elder of the daughters having a son who survived his maternal grandfather. The *taluk* fell within one or other of the sub-sections of section 22. The widow claimed her estate for life in it under sub-section 7; and the main question on this appeal was whether or not the lower Courts had rightly decided that her claim to the *taluk* had been defeated by the daughter's son having been brought within the operation of sub-section 4, that son having been treated by the late *talukdar*, in all respects, as his own son. The suit was brought on the 30th July 1886 by the widow, Ahmadi Begum, through her father Saiyad Mahomed Abud, she being of unsound mind. Her husband, the last *talukdar*, Chowdhri Raza Hossein, died intestate on the 22nd November 1885, having inherited the *taluk* from his father Husain Buksh, whose name, as *talukdar*, was entered in the lists. Besides the *taluk*, the plaint claimed a life estate, "according to custom," for the widow in lands not *talukdari*, and in the moveables.

(1) I. L. R., 3 Calc., 626; L. R., 4 I. A., 228.

Of Raza's two daughters, Sarfraz and Umrao, the former, the elder, was married, but lived in her father's house, where a son named Sajjad was born to her. He was in his fifth year when Raza died, and in his name, on the 4th June 1886, *dakhil kharij* of the *taluk* was made. Both he and his mother died while this suit was pending in the Court below. In lieu of Sajjad the name of Irshad, his younger brother and next heir to the *taluk*, was entered on the record. The defence made for Sajjad was that he had a title under sub-section 4. It was also alleged for him that the plaintiff, as a childless widow, was not entitled under the Imamia law, the parties being Shias, to the immoveable property of her husband, and that by custom also the moveable property followed the *taluk*. The District Judge found that it had been shown that Raza so exceptionally treated his daughter's son Sajjad as to give him in the family the place and pre-eminence which would have belonged to the *talukdar's* son had one existed; and was of opinion that this indicated that the *talukdar* desired that Sajjad should be his successor. This was ascertained by reference to statements of witnesses, to documents, admissions, and conduct at ceremonies. He therefore dismissed the suit for the *taluk*. As regards the other property referring to the Shia law that a childless widow cannot inherit (for which he cited *Asloo* v. *Umdutoonissa* (1), he held that this was governed, as regarded the *taluk*, by sub-section 17. As to the moveables he referred to part of the judgment in *Ishri Singh* v. *Baldeo Singh* (2), to the effect that there was no evidence to show that the family property, other than the *taluk*, followed a line of devolution different from that of the *taluk*, holding that there was a resemblance in the cases on this point.

The Judicial Commissioner, dismissing an appeal on behalf of Ahmadi, found that Raza treated Sajjad in all respects as his own son, so far as so young a child could be treated; and that he had taken occasion many times to declare openly that Sajjad was to be his successor. He confined his judgment to the question as to the *taluk*.

On the 30th November 1891 Ahmadi died. Her appeal, which

(1) 20 W. R., 237. (2) I. L. R., 10 Calc., 792, at p. 807.

1894

UMRAO BEGUM v. IRSHAD HUSAIN.

proceeded on the ground that Sajjad had not, in fact, been so treated as to render sub-section 4 applicable, abated on her death. On the 30th July 1892, an application was made by Umrao Begum, the surviving daughter of the late *talukdar*, for leave to revive the appeal.

Mr. *J. D. Mayne*, who appeared for the petitioner, relied on her being first in the order of possible heirs if, on the decision of the appeal, the judgment of the Courts below, as to the treatment of Sajjad, should be reversed. He referred to *Kattama Nauchear* v. *Rajah of Shivaganga* (1), in which case an order of revivor was made, giving leave to a daughter and her sisters to prosecute an appeal on grounds like the present. After hearing Mr. *J. H. A. Branson* for the objector, their Lordships granted the leave.

On the revived appeal,—

Mr. *R. B. Finlay, Q. C.*, and Mr. *J. D. Mayne* for Umrao Begum, argued that no preferential title had been established in the daughter's son, within sub-section 4, over that of the surviving daughter. They referred to the judgment in *Pertab Narain Singh* v. *Subhao Kooer* (2), and argued that the treatment of the daughter's son by the *talukdar* must, in order to render sub-section 4 applicable, conform to the general construction put in that case upon this exceptional provision. Here, however, its treatment had been no other than would ordinarily be that of one only grandson, born in the house of a *talukdar*, and could not be referred to an intention to create the right of inheritance. That treatment had been only consistent with the *talukdar's* affe tion; and, as the child was already within the line of succession, and a possible heir, there was no such conduct towards him on the part of the *talukdar* as to give him the position of heir next entitled. This applied to the presentment of the child to the tenants. Mere statements and expressions, not accompanied by acts, would be insufficient. It was not an uncommon thing in that part of the world for a married daughter to live with wealthy parents. It was necessary, in order to establish the defence, that the evidence should come up to the standard indicated in the case cited. It was submitted that the

(1) 9 Moo., I. A., 539. (2) I. L. R., 3 Calc., 626; L. R., 4 I. A., 228.

daughter was entitled to the *taluk*, and to that share of the whole estate of the late Raza which, according to Mahomedan law, would descend to his daughter.

Mr. *A. Cohen, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, were not called upon.

Their Lordships' judgment was afterwards, on June 30th, given by

LORD HOBHOUSE.—The original plaintiff in this suit was Ahmadi Begum, the only surviving widow of Raza Hossein, Talukdar of Narauli, who died in the year 1885, leaving no son. He had two daughters who survived him; the elder named Sarfraz and the younger named Umrao, who is the present appellant. Sarfraz married Ahmed Hossein, who is one of the respondents, and at the death of Raza she had a son named Sajjad Hossein, then less than five years old. The original defendants in the suit were Sajjad, Sarfraz, and Umrao.

BENGAL SECRETARIAT LIBRARY.

The *taluk*, being entered in lists 2 and 3 under the Oudh Estates Act, is one of those which descend to a single heir by primogeniture, and which fall under the provisions of section 22 of that Act. On Raza's death a claim was preferred on behalf of the child Sajjad, that he was entitled to the *taluk* under sub-section 4, inasmuch as he had been treated by Raza in all respects as his own son. On that claim Sajjad got possession, and soon afterwards Ahmadi instituted this suit. The title is governed entirely by the question whether Sajjad was treated by Raza as a son. If he was, the *taluk* passed to him and his male lineal descendants by virtue of sub-section 4. If not, it passed to Ahmadi for her life by virtue of sub-section 7.

Ahmadi, Sarfraz, and Sajjad have all died since the institution of the suit. Sajjad has been replaced on the record by his brother Irshad. On the death of Ahmadi the appeal abated, and Umrao was allowed to revive it under circumstances on which their Lordships will presently make some remarks.

It is common ground that Sajjad's mother, Sarfraz, was after her marriage taken into Raza's house, and that Sajjad was born there, and from that time till Raza's death he was treated as a child of the house. Evidence was given of a number of inci-

1894

UMRAO BEGUM v. IRSHAD HUSAIN.

dents, some apparently trivial and some important, for the purpose of showing that Raza's treatment of Sajjad was that of a son. On Ahmadi'a side it was contended that all those incidents were sufficiently accounted for by the circumstance that Sarfraz and her son were inmates of Raza's house, and that Sajjad was his grandson, and in the line of succession. The case appears to have been very elaborately examined by the Courts below; first by the District Judge of Lucknow, and afterwards by the Judicial Commissioner of Oudh. Both Courts held that Sajjad had been treated as a son by Raza, and that Ahmadi's claim must be dismissed.

This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be especially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. The Counsel for the appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or general principle for impugning the decree.

To do this, they made some comments on the use made by the Courts below of Raza's oral statements, but those comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility. The only question of law or principle which they could suggest was founded on the language used by this Committee in deciding the well-known case of Man Singh's estate [*Pertab Narain Singh* v. *Subhao Kooer* (1).] It appears to have been pressed upon the Committee that the treatment required by the Oudh Estates Act must be something of the nature of adoption. In answer to that suggestion their Lordships pointed out that the section applies, not to Hindus alone, but to all religions, and they continue as follows:—

"It is necessary, then, to put a genera as well as rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their

(1) I. L. R., 3 Calc., 626; L. R., 4 I. A., 228.

Lordships are of opinion that wherever it is shewn by sufficient evidence that a *talukdar*, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question."

Upon this passage Mr. Finlay argued that the Committee intended to lay down an authoritative interpretation of the language of sub-section 4 of universal application ; that treatment, which does not conform to the description there given, cannot rightly be held to fall within the sub-section ; and that the Committee meant to indicate that the acts of treatment must be absolutely unequivocal and not by possibility referable to any other relationship than that of a son. But this argument puts a strained and unnatural construction on the words of the Committee. Their expression " general construction " clearly refers to the propriety of so construing the Act that it may apply to Mahomedans and others as well as Hindus. The rest of the passage is only a statement in abstract form of circumstances which will clearly bring a case within sub-section 4. In the sequel of the judgment they show that those circumstances exist in the case before them. There is nothing to show that the Committee intended to set up a standard to which all cases must conform, or that they demanded more demonstrative proof for this kind of question than for any other.

Their Lordships hold that, whenever the evidence shows that a daughter's son has been treated by the *talukdar* in all respects as his own, it is sufficient to bring the case within sub-section 4 ; that the question is one of fact, and must be tried and determined by the same methods as other questions of fact ; and that it is very difficult, if not impossible, to lay down a test for such a question in terms less wide than those of the Act itself.

Their Lordships do not comment on the evidence in detail, because they think it important to maintain the general rule as to concurrent findings of fact. But as during the discussion their attention has been called to several points in the evidence, they think it right to add that nothing has been brought forward to

1894

UMRAO BEGUM v. IRSHAD HUSAIN.

induce them to think that the Courts below have taken any wrong view.

As regards the *taluk* the appeal fails. But Raza was possessed of other property not belonging to his *taluk*, both moveable and immoveable. Ahmadi claimed the whole; and Umrao now claims that, whatever the decision as to the *taluk*, the rights of the parties to the *non-talukdari* property should be dealt with in this appeal. It appears that by her plaint Ahmadi claimed the whole property in block as devolving to her by force of sub-section 7 of the Oudh Estates Act and by custom; that, being a Shia and a childless widow, she was not entitled to any interest in the immoveables; and that in Court she did not press any claim to the moveables. What interests Umrao may have independently of Ahmadi is a question that has not been argued, because their Lordships are of opinion that the revived appeal is confined to the question raised between Ahmadi and Sajjad with regard to the *taluk*.

On Ahmadi's death Umrao, being in the line of succession, applied to the Judicial Commissioner of Oudh to be allowed to revive and prosecute the appeal. That learned Judge felt difficulty in acceding to her application, but directed the proceedings to be forwarded to the Registrar of the Privy Council as a Supplementary Record. Umrao then applied to Her Majesty in Council for an order of revivor and substitution. Their Lordships also felt difficulty, and in fact the case is peculiar and novel. But it appeared to them that the question of Sajjad's *status* must be settled, even if it should only affect the past income; that it would be simpler and less expensive to try it by the existing appeal than by a new suit; and that the Oudh Estates Act so far created a unity of interest between the persons in the line of succession as to justify the substitution, at least in such a case as this, of the more remote claimant for the nearer one. The application was not heard *ex parte*. Mr. Branson appeared for the respondents, and agreed that the substitution of Umrao would be more beneficial to them. The order therefore was made at the wish of both parties. But nothing was said in the petition or at the bar about *non-talukdari* property. The reasons for the revivor apply only to the *taluk*; and it would obviously be improper and

dangerous to allow Umrao to use the position she has obtained as the substitute of Ahmadi for the purpose of advancing her personal claims. Whatever claims Umrao has against any part of the estate she must enforce by suit on her own behalf. The present appeal wholly fails, and their Lordships will humbly advise Her Majesty to dismiss it with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson & Beard.*

For the respondent: *The Solicitor, India Office.*

IMAMBANDI BEGUM (PLAINTIFF) *v.* KAMLESWARI PERSHAD (DEFENDANT.)

P.C.*
1894
April 18.
June 9.

[On appeal from the High Court at Calcutta.]

Landlord and Tenant—Apportionment of rent—Decree apportioning rent, reserved in a mokurari lease, to the land transferred—Lessee getting possession of less land than stated in lease—Right of lessee to abatement of rent.

A decree had determined that lands, leased in *mokurari* to a lessee, with a fixed rent thereon, were less in extent than they were specified to be in the *pottas* that comprised them, the lessors not having title to the whole; and the lessee had obtained possession of the less estate. *Held*, that the lessee was entitled to a corresponding abatement of the rent reserved.

The revenue-paying *mehal*, within which were the lands subject to the *mokurari*, such lands being shares of *mouzas* therein, was afterwards sold for arrears under Act XI of 1859. The purchaser at that sale was sued by the *mokuraridar*, to make good her incumbrance under section 54 of the Act. The lease was maintained by the decree that followed, but only as to part of the shares specified in the *pottas*, and the lessee obtained possession of that part only.

In this suit for mesne profits brought by the lessee against the purchaser's heir, who filed a cross suit against her for rent, it was held that, as the lessee had not proved that she, having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the word. But when, in her suit for possession, part only was decreed to her, and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She, therefore, had the same equity for an apportionment as if she had been evicted.

On the facts it was rightly found by the first Court that the leases were

* *Present*: LORDS HOBHOUSE, ASHBOURNE and MACNAGHTEN, and Sir R. COUCH.

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

not taken with knowledge on the part of the lessee that the title was a doubtful one.

Two consolidated appeals from two decrees (13th July 1891) of the High Court, reversing two decrees (20th May 1889) of the Additional Subordinate Judge of Monghyr.

The appellant, the plaintiff in the first of these suits, was the widow of Nawab Abdul Ali of Patna; and the defendant, respondent, who had brought the second, or cross, suit, was a zemindar and *mahajun* of Monghyr. The two suits were heard together in the Court of first instance and on appeal. A difference of opinion having arisen on a matter of law between the Judges of the Appellate Court at the hearing on the 9th of June 1891, that matter was referred under section 575 of the Civil Procedure Code; and the final judgment of the High Court dismissing the appellant's suit was delivered by PETHERAM, C. J., on the 13th July 1891.

The object of Imambandi's suit brought in May 1888 was to recover mesne profits for three years, from 1885, upon a one anna thirteen gundas share in one set of villages, and upon a one anna eleven gundas share in another set, both sets being *mouzas* in a revenue-paying *mehal* named Bisthazari. These shares, with other, and substantially greater, fractional parts of the *mehal*, had been comprised in *pottas* executed, one on 1st March, and the other on 6th April, 1866, to Imambandi by two brothers, Tasudduck Hossein and Mahomed Taki, who had inherited the property from their deceased sister, Bahu Begum. Each *potta* purported to be a permanent lease of one moiety of 6 annas and 12 dams of specified villages. The consideration of the first was expressed to be *nazrana* of Rs. 4,630, and a fixed annual *jama* of Rs. 2,912, of which last sum Rs. 2,828 was to be paid for Government revenue and Rs. 84 was to be paid to the lessor. The consideration of the second lease was a *nazrana* of Rs. 2,911, and a rent of Rs. 2,888, of which Rs. 2,828 were to be paid as revenue, and Rs. 60 to the lessor. The revenue stated was, in fact, the amount for which the entire 6 annas and 12 dams share, as held by Bahu Begum, was liable in the Collectorate records. The Collector separated a portion of Bisthazari, making it a distinct revenue *mehal*, Rs. 7,271 being its revenue; and this comprehended the *mouzas*

subject to the *mokurari*. This separated *mehal*, on its revenue having fallen into arrear, was sold by the Collector for default, and was purchased in June 1875 by Ram Pershad, father of Kamleswari. To establish against Ram Pershad her *mokurari* leases, as incumbrances to which the share purchased by him was subject, within section 54 of Act XI of 1859 (the Bengal Revenue Sale Law), Imambandi sued in 1878. Her suit, which ended in the judgment of the Judicial Committee in *Imambandi Begum* v. *Kamleswari Pershad* (1) resulted in her obtaining little more than a three annas share, which was declared subject to her *mokurari*, appearing that the brothers who leased to her had no title to lease more. That judgment gave to Imambandi a one anna share, in addition to those which she obtained by the High Court's decree, and withdrew from the decree a condition which it had imposed that she, as lessee, if she took possession, should pay the full rent reserved by the *pottas* of 1866. According to that judgment, the question whether the rent so reserved should be paid in full, or should be apportioned to the estate recovered, was not one for decision in that suit. It was one for future determination, if it should become necessary to decide it. Possession under the order that followed was given to this appellant in June or July 1887. When the suit for mesne profits was instituted a decision became necessary.

The defendant, by his written statement, sought to set off, against the claim, Rs. 17,404, which was the aggregate amount for three years of the entire rent of Rs. 5,801 reserved to be paid annually by the two *mokurari pottas* of the year 1866, under which the plaintiff had set up a title to the six annas and some gundas of Bisthazari. He also filed a cross suit, claiming a decree for payment of rent at the full amount agreed upon in the *pottas*, *viz.*, the last mentioned sum.

The matter in dispute between the parties to this appeal remained the same that was expressed in one of the issues (framed in the cross suit) to this effect—whether, after the decision in the suit of 1886 had given to Imambandi only about a fourth part of the shares which had been leased to her in 1866,

(1) I. L. R., 14 Calc., 109 ; L. R., 13 I. A., 160.

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

Kamleswari, as successor to his father, Ram Pershad, was entitled to receive from her the whole rent, or could only claim rent in proportion to the shares decreed to her.

The Subordinate Judge decided that the rents should be apportioned. He found no evidence to support the contention that the plaintiff had taken the leases, knowing that the lessors had only one-fourth of the shares from their sister Bahu Begum. On the contrary he found that she, as the widow of Abdur Rahman, "was considered in documents" as the sole owner of the inheritance; and the two brothers had obtained certificates under Act XXVII of 1860, as her representatives, on her death. It was probable, in his opinion, that the plaintiff was under a mistake of fact as to the amount of property to which she would become entitled by the operation of the lease; and he regarded her as entitled to the relief claimed in respect of the rents. He fixed the rent at Rs. 1,227-12-2. The claim for mesne profits he found to be Rs. 14,693-2-7. His decree was for Rs. 10,126-7-0, with interest, in favour of Imambandi. In the cross suit he awarded a rent of Rs. 1,273.

Kamleswari appealed in both suits. The judgment of PRINSEP, J., who, with BEVERLEY, J., heard the appeals (in that part of it which related to the apportionment of the rent) was as follows:—

"It is contended on behalf of Imambandi, the lessee, that treating Kamleswari Pershad as her lessor, she is entitled to claim relief in respect of the rent which was originally fixed with regard to the property leased, and that inasmuch as the extent of that property, that is to say, the share of the estate held by her lessor, has been declared to be less than he professed to hold, she is entitled to claim a proportionate abatement of rent. The lease declared that a portion of the rent payable by Imambandi was to be paid direct to the Collector in satisfaction of the revenue on the entire share which the lessor professed to hold, the balance, which is a comparatively small sum, being paid to the lessor. The sum to be paid to the Collector represents the revenue due on the entire estate, and is therefore considerably in excess of what would be due from Kamleswari Pershad on the share that he holds, though that share is greater than that covered by Imambandi Begum's *mokurari*. It is contended on the one hand that the lessee is entitled to proportionate abatement of rent, and, on the other, that she must take up the lease as it now stands or throw it up and claim damages, but that she cannot hold the lease and also claim an abatement of rent on the ground that she cannot obtain

possession of the entire property leased. We have been referred to section 15 of the Specific Relief Act and to the cases of *Maw* v. *Topham* (1) and the *Earl of Durham* v. *Legard* (2). I have had much difficulty in dealing with this matter, and especially because the inclination of my own opinion is contrary to that formed by my learned colleague, who would, on these authorities, decide the point against Imambandi Begum. But after the fullest consideration I regret to be unable to agree with him. The essence of the agreement between Imambandi and her lessor in regard to the payment of her rent was that the entire revenue on the estate should be paid by her to the Collector to relieve her lessor's liability, and that the balance should be paid to the lessor himself; and it was understood that the sum total should represent the rent due on the lease of the entire property. No doubt the title to the entire estate was doubtful, and therefore it was doubtful whether a lease of that property could be given; but the rent was fixed on that basis, and that is especially shown from the manner in which the payments were to be made. It is difficult to understand the benefit which the original lessor, if his rights in the property remained reduced to the extent prescribed in the judgment of their Lordships of the Privy Council, would have received from such payments to the Collector in excess of his quota of the revenue payable on his share of his estate; and I am inclined to think that the opposition of Kamleswari to any reduction of the rent agreed to by Imambandi is in some measure due to his possessing zemindary interests over properties not covered by the *mokurari*, although, if the shares of the lessor and lessee remained co-extensive, such excessive payments of revenue would be to the benefit of third parties, and would not benefit the parties to the original lease as contemplated. The intention of those parties is thus made clear. But surely Kamleswari Pershad, who has purchased a larger share and interest in the estate than that covered by the *mokurari*, but subject to that lease, is not entitled to this relief because he by an accident holds such larger interest in the estate. We have, therefore, in any view of the position of the parties, the fact that the payment by Imambandi of the entire revenue to the Collector by way of assignment was intended for the benefit of the lessor and the lessor alone, that it was so intended by a convenient arrangement to relieve the lessor as proprietor of the entire zemindary from the trouble of paying Government revenue; and we may take it that if the lessor's interest had alone passed to Kamleswari Pershad, he would not desire to enforce the claim now set up to its full extent. He would in all probability assent to the abatement of rent at least to an extent which would not benefit him. This sum practically represents all the abatement asked for, since the balance of the rent payable directly to the lessor is only a small sum. If he held only the share of the lessor, and Imambandi withheld payment of revenue except to the amount of that share, he would not suffer, for the other sharers would be liable, and they could have no claim against Imambandi.

(1) 19 Beav. 576. (2) 34 Beav. 611.

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

"The cases cited are both cases of specific performance of sale. The case before us seems rather one of abatement of rent because the lessor could not give the lessee the entire estate leased, and the lessee asks to have the intention of the parties carried out under which the rent was settled, and this is shown by the mode of payment adopted on that basis. There is no difficulty in settling the amount of the abatement, because the title of the lessor has been clearly defined, and the apportionment is merely one of simple calculation. This seems to me to have been the difficulty felt in the case of *Earl of Durham* v. *Legard* (1), and this seems in a great measure to have influenced that decision. As this point too is one of the matters prominently set out in section 15 of the Specific Relief Act, I am of opinion that the case does not strictly fall within the purview of that law, or indeed within the cases cited, but that it can more properly be regarded as one of abatement of rent.

"On these grounds I am constrained to disagree from the opinion of my learned colleague, but only on this point. The appeal is otherwise dismissed.

"On that point the appeal must be re-heard before a Judge or Judges to be appointed by the Chief Justice."

BEVERLEY, J., was of opinion that Imambandi was not entitled to any abatement of the full rent if she insisted on taking the interest which her lessors had to give. He considered the matter to be one that was within the contemplation of the 15th section of the Specific Relief Act (I of 1877), and found upon the evidence that there was reason to believe that both parties to the agreements were aware that the lessor's title to the entire property of Abdur Rahman was doubtful. He referred to the price, which was low in regard to the value of the estate. In his judgment, there could be little doubt hat the plaintiff took the leases with the knowledge that the estate was less than it purported to be in the *pottas*, and there was the analogy of the law, as stated in the cases cited from Beavan's reports, applied to purchasers who received estates less in area than those for which they had contracted.

PETHERAM, C.J., who, on the point of law referred to him, concurred with BEVERLEY, J., was of opinion that the present case was "much more like a sale with a misdescription of the property sold than a lease of a specified area of land," and that, therefore, Imambandi, if she elected to retain possession of any portion of the property under the leases, must pay the entire rent.

He accordingly allowed Kamleswari's appeals in both suits,

(1) 34 Beav., 611.

and declared him entitled in the suit in which he was plaintiff to the full amount of the rent reserved by the two leases (*i.e.*, Rs. 5,801-7-6) for the years in respect of which he had sued, and to set off the aggregate of that rent in Imambandi's suit against the amount due to her for mesne profits.

The *Attorney-General* (Sir *Charles Russell*, *Q. C.*), and Mr. *R. V. Doyne*, for the appellant :—The lessee obtained possession of only a fourth part of the shares which the *mokurari* leases purported to give, and she should not be held liable to pay the whole rent which had been fixed on a different understanding. The main reason assigned by the majority, that had decided to the contrary in the High Court, was an alleged fact, supported for the first time in the judgment of BEVERLEY, J., with whom PETHERAM, C.J., concurred, that Imambandi had known the doubtful nature of the lessors' title to lease, and had taken the risk of getting less than the *pottas* gave her. Against this, the first Court found there was no evidence of that state of things, which had been correctly described in the judgment of PRINSEP, J., in adverting to the "essence of the agreement." The whole proposition, on behalf of Imambandi, was that she was not liable as lessee for what she had not obtained from the lessors.

According to the English law, where a lessee was evicted from part of the land by title paramount, he would have to pay only a rateable proportion for the remainder. This was the law according to Chief Baron Gilberts' "Treatise on Rents," edition of 1758, p. 147. Of that work Division VI was entitled thus : "What acts of the lessor or the lessee amount to a discharge of the rent, and herein of the eviction of the land, the suspense, extinguishment, and apportionment of the rent." In this, one of the propositions was that—"if part of the land that was letten be evicted from the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted"—citing 10 Coke, 12*a*, and other authorities. The Chief Justice's judgment referred to the law as between the vendor, who had less to sell than his contract contained, and the purchaser, who obtained less than he had bought. As to this the law was not against the plaintiff's contention, if applicable at all to the case. It was stated in

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

Hill v. *Buckley* (1) that the right of the purchaser was to have what the owner could give "with an abatement out of the purchase money, for so much as the quantity fell short of the representation."

Relief in Equity, where the particular lands on which a rent was charged could not be fixed on, was referred to in White and Tudor's Leading Cases, 6th edition, 449. Reference was made to *Hooper* v. *Smart* (2), where vendors of freehold, not having a title to more than half of the property which they had sold to a purchaser, were obliged, in a suit by him for specific performance as to that half, to submit to an abatement of the purchase money; also to *Castle* v. *Wilkinson* (3), *Barnes* v. *Wood* (4), and Woodfall's Landlord and Tenant, 11th edition, 364, 372.

Mr. *R. B. Finlay, Q.C.*, and Mr. *J. D. Mayne*, for the respondent, relied on the knowledge of the lessee as to the doubtful nature of the title. They contended that it had been found by the Appellate Court, having been from first to last a material fact, raised by the issue in the cross suit, which issue stated, generally, the subject of inquiry, referring expressly to the question of Imambandi's liability to pay more than rent in proportion to the shares decreed to her, and if so to how much. If she knew the fact as to the title, her liability remained, as she had taken the risk, under the circumstances of this case, which were examined to show that the inference of her having known the above was correct, the appellant could not have obtained an apportionment of rent as against her lessors. And as against this respondent, the purchaser's heir, even if the appellant had had any remedy which she might have enforced against the lessors, no such remedies existed. The appellant had failed to establish a case for equitable relief, and the result at which the majority of the Judges had arrived was correct. The appellant in the result, although she had not obtained possession of a large proportion of the property nominally transferred to, had received and retained possession of all that she ever had reason to believe was included in the grant.

(1) 17 Vesey, 394.
(2) L. R., 18 Eq., 683.
(3) L. R., 5 Ch., 534, 536.
(4) L. R., 8 Eq., 424.

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment, on the 9th June following, was delivered by

SIR R. COUCH.—By a lease, dated the 1st of March 1866, made by Tasudduck Hossein Khan, one of the two brothers of Mussummat Fatima Begum, *alias* Nawab Bahu Begum, deceased, who it is stated in the lease died, leaving a share of 6 annas 12 dams of another share of 15 annas 6 dams of certain *mouzas* therein named, and a share of 4 annas out of another share of 15 annas 6 dams in other *mousas* also named, one half of which devolved on Tasudduck Hossein, and the other half on his brother, Mirza Mahomed Taki Khan, Tasudduck Hossein granted in *mokurari* (perpetual) lease his half-share, *viz*, 3 annas 6 dams of the shares of Bahu Begum in the *mousas*, with the exception of those which are said to have been sold during her lifetime in execution of a decree, on receipt of Rs. 4,630 as *nazrana* (premium), and at a fixed annual rent of Rs. 2,912-11-9 (out of which Rs. 2,828-11-9 were to be paid as Government revenue of the *mousas*, and Rs. 84 as the lessor's profits), to Syed Jaffer Ali. The lease contained the following passage: "It is required that the said *mokurari*-holder should remain in possession of the aforesaid shares of the abovenamed *mousas*, and out of the aforesaid fixed amount of rental continue to pay Rs. 2,828-11-9 in the treasury of the Collector of Monghyr, and the remaining Rs. 84, my reserved rent, to me the declarant, instalment by instalment."

On the 6th of April 1866 Mirza Mahomed Taki Khan, the other brother, made a similar lease of his 3 annas 6 dams share on receipt of a *nazrana* of Rs. 2,911 at an annual rent of Rs. 2,888-11-9, out of which Rs. 2,828-11-9 were to be paid as Collectorate revenue of the *mousas*, and Rs. 60 as reserved rent to Mussummat Nazirunnissa. This lease contained a similar passage as to possession and payment of the Government revenue and rent.

On the 13th June 1875 the respondent's father Babu Ram Pershad bought the entire *mehal* of Bisthazari, of which the leased shares of the *mouzas* were parts, at an auction sale for arrears of Government revenue, and by the terms of section 54 of Act XI of 1859, entitled "An Act to improve the law relating to sales of

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

land for arrears of revenue," he acquired the *mehal*, subject to all incumbrances, and with only the rights which were possessed by the previous owner or owners. Syed Jaffer Ali and Mussummat Nazirunnissa were servants of the appellant Imambandi Begum and the leases were made to her in their names.

Disputes arose between Imambandi Begum and Ram Pershad, and in 1878 she brought a suit against him and others to establish her rights to the shares in the *mouzas* comprised in the leases, of part of which shares she said she was absolutly dispossessed, and of the other part that Ram Pershad had denied her *mokurari* right. The facts of the case were very complicated, the question being what were the shares of Bahu Begum and the other defendants in the *mouzas*. Judgment was given by the Subordinate Judge on the 15th August 1880. One of the issues settled was whether the grantors of the *mokuraris* to the plaintiff, or the plaintiff herself, held possession of the disputed shares within twelve years before the institution of the suit, or had been out of possession for upwards of twelve years. The finding of the Subordinate Judge upon this issue was against the plaintiff, and he dismissed the suit. Imambandi appealed to the High Court. One of the Judges of that Court found that within twelve years next before the institution of the suit the plaintiff herself and her lessors were in possession of the disputed property. The other Judge said that Bahu Begum and after her her brothers were certainly in possession as late as April 1866. The first lease is dated the 1st March 1866 and the second lease the 6th April 1866. The suit was commenced on the 28th February 1878, just within the twelve years allowed by the law of limitation. Their Lordships think that it must be taken as a fact that Imambandi did not enter into possession under the *mokuraris*. The High Court found that the share of Taki and Tasudduck Hossein, which they derived from Bahu Begum, was at best one-quarter of her husband's estate of 6 annas 12 dams, from which 1 anna sold by Bahu Begum should be deducted, leaving 13 dams in respect of some of the villages ; that the share was further reduced in respect of some villages by a decree for 7 dams in favour of another person, and there remained a share of 11¼ dams in those villages. The Court also said that the

plaintiff having caused a certain number of the villages covered by her leases to be sold on the 30th January 1868 she could not claim to hold them as lessee, and the suit must be dismissed as to them. Then it was said by the Court that if in execution of the decree the plaintiff elected to recover possession of the aforesaid shares, she would be bound to pay annually Rs. 5,801-7-6, the *mokurari* rent reserved in the *mokurari pottas*, and the decree was so made.

Imambandi appealed to Her Majesty in Council against this decree. Upon the argument of the appeal before this Committee their Lordships were of opinion that the decree of the High Court should be affirmed with two exceptions, *viz.*, that the 1 anna share should not be deducted from the one-fourth share, and that the condition that Imambandi would be bound to pay the whole of the rent reserved by the *mokurari pottas* should be omitted from the decree, leaving the liability for rent to be determined thereafter, if it should become necessary, as the question whether the rent should be apportioned or not did not appear to have been raised and ought not to be decided in that suit. The decree of the High Court was accordingly by Her Majesty's Order in Council varied to that effect, and in other respects was affirmed. Ram Pershad having died, his son Kamleswari Pershad was made respondent in his place. Possession of what was decreed was given to Imambandi (between the 18th June and the 13th July 1887).

On the 28th May 1888 Imambandi brought a suit against Kamleswari Pershad in the Court of the Additional Subordinate Judge of Monghyr to recover Rs. 14,693-2-7 as mesne profits for three years of the share of which she had been decreed possession, her claim to mesne profits for a longer period being barred by the law of limitation. Kamleswari Pershad in his written statement claimed to set off against the plaintiff's claim the whole rent reserved by the *mokurari* leases for the three years, his claim to rent beyond that period being also barred. And on the 30th July 1888 he brought a suit against Imambandi in which he claimed payment of the full amount of the rent so reserved. Imambandi by her written statement offered to pay such an amount of the rent reserved as was proportionate

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

to the share of which she had obtained possession. The suits were heard together, and on the 20th May 1889 the Additional Subordinate Judge gave judgment in them. Upon the issue as to set off he found that Imambandi was entitled to an apportionment of rent, the annual amount of which he fixed at Rs. 1,227-12-2½, and deducting that amount for three years with interest from the mesne profits allowed, he gave a decree in favour of Imambandi for Rs. 10,126-7 with interest. In the suit by the respondent he awarded an annual rent of Rs. 1,243-1-10. The difference between that and the amount fixed in the other suit is not explained. Kamleswari Pershad appealed in both suits to the High Court, which gave judgment on the 9th June 1891. On all the points raised except the question of apportionment the two Judges agreed with the lower Court. On that point they differed, the senior Judge being in favour of apportionment and the junior against it. The matter was accordingly referred to the Chief Justice to be decided according to section 575 of the Civil Procedure Code. The Chief Justice agreed with the junior Judge. Imambandi's suit was dismissed with costs, and in the suit of Kamleswari Pershad it was declared that Imambandi should pay the full sum of Rs. 5,801-7-6 reserved by the leases. The reference under section 575 being only allowed on a point of law, if two or more Judges differ upon a question of fact the decree appealed against is to be affirmed. Therefore in this case the facts must be taken according to the findings in the judgment of the Subordinate Judge.

Imambandi has appealed to Her Majesty in Council against the decision of the High Court, and the question to be determined is whether the rents reserved by the *mokurari* leases should be apportioned. As Imambandi did not prove that she entered into possession under the leases and was then dispossessed, there was not an eviction in the proper sense of the word. But when Imambandi was obliged to bring a suit to obtain possession, and succeeded in obtaining only a part of what was granted in *mokurari*, and was precluded by the result of the suit from having possession of a substantial and the larger part, she was in a similar position to having been evicted from that part, and there is the same equity for an apportionment as in a case o

eviction. Indeed this was not disputed by the learned Counsel for the respondent. It was submitted to their Lordships that Imambandi knew that the lessors were not entitled to the whole of the shares leased, and a paragraph in the respondent's written statement in the first suit was referred to. In that he said that though the extent of the share in the leases was ostensibly 6 annas 12 dams the rent was fixed in consideration of a one-fourth share. No such question as this was raised by the issues in either of the suits, nor apparently was any evidence offered upon it. The Subordinate Judge says in his judgment: "It is contended by Kamleswari that the plaintiff took the *mokurari* knowing that the lessors, *i.e.*, the two brothers of Bahu Begum, had only a one-fourth share in the disputed properties; but that assertion is not supported by any evidence. On the other hand, we find that Bahu Begum, the wife of Abdur Rahman, was considered in documents the sole owner of the properties; and after the death of Bahu Begum, her two brothers obtained two certificates . . . for collecting her debts under Act XXVII of 1860. . . . Therefore it is probable that the plaintiff was under a mistake of fact regarding the right of Bahu Begum." This is in the part of the judgment upon the issue whether the defendant was entitled to any and what set-off. Their Lordships do not regard the question of the lessors' knowledge as being put in issue by the question of the amount of the set-off. If it was, there is a finding upon it which stands affirmed by the High Court. But they think that no issue upon that question having been tried by the Subordinate Judge, it ought not to be allowed to be raised in this appeal. In the grounds of appeal to the High Court in the respondent's suit it is said that the Court below ought to have held that the *mokurari* leases were of a speculative character, and that Imambandi was fully aware at the time of the execution thereof that her lessor's title was under litigation. It might possibly be an answer to the claim for apportionment of the rents that the leases were taken as a speculation, and that Imambandi intended to take the risk of the result of the litigation, but such a case would require to be very clearly proved, and upon the evidence before the Subordinate Judge it would have been plainly wrong to have found that the

1894

IMAMBANDI BEGUM v. KAMLESWARI PERSHAD.

leases were speculative. Their Lordships are of opinion that the rent was rightly apportioned by his decree, and that the appeals to the High Court ought to have been dismissed. They will humbly advise Her Majesty to reverse the decrees of the High Court and to order the appeals to it to be dismissed with costs, the decrees of the Subordinate Court being thus affirmed. The respondent will pay the costs of these appeals.

Appeal allowed.

Solicitors for the appellant: Messrs. *Broughton, Norton & Broughton.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

INSOLVENCY.

Before Mr. Justice Sale.

IN THE MATTER OF DE MOMET.

1894 *June* 25.

Insolvent Act (11 and 12 Vict., c. 21) s. 60—Trader—Indigo Planter—Statute 12 and 13 Vict., c. 106, s. 65—Workmanship of goods or commodities.

An indigo planter is a "trader" within the meaning of section 60 of the Insolvent Act.

THIS was an application by the insolvent for his final discharge under section 60 of the Insolvent Act.

The insolvent had for some years prior and down to the commencement of 1893 carried on the business of an indigo planter at the Busharutpore Indigo Concern in the North-West Provinces. His schedule showed the name of only one creditor, a Mr. Legge, who was his partner in the indigo planting business, the partner in fact whose name appeared in the business, and to whom he was indebted to the amount of about Rs. 75,000, a debt incurred in 1870, whilst he was an indigo planter in partnership with Mr. Legge. The original debt was Rs. 60,000, but it had increased by the accumulation of interest. The insolvent had already obtained his personal discharge. The case, so far as it dealt with the jurisdiction of the Court to entertain his petition, as he had only a temporary residence in Calcutta, is reported in I. L. R., 21 Calc., 634. The only point now material was whether the insol-

vent was, or was not, at the time he incurred the debt, a trader under section 60 of the Insolvent Act.

Mr. *Dunne* in support of the application referred to the case of *In re King* decided by Trevelyan, J. In that case the insolvent was an indigo planter, and he had obtained his final discharge under section 60. He submitted that an indigo planter was a trader within the meaning of that section, and that this case was similar to the case cited, which should be followed. Reference was made to 12 and 13 Vict, c. 106, section 65, and the definition of "trader" there given.

Mr. *T. A. Apcar*, *contra*.—The question was not actually raised and decided in the case of *In re King*. That case was distinguishable, for there the insolvent was described as an indigo planter and "dealer in indigo." This was not a trading debt, but a debt merely owing to his partner in the indigo factory, in respect of the insolvent's share in the partnership. He submitted that an indigo planter did not come within the definition of "trader" in the Act.

The cases under the English Bankruptcy Acts, as to who were considered or not considered traders, were referred to as being in point. A farmer is not a trader under those Acts. To carry on the "trade of merchandize" there must be buying and selling: *Suttom* v. *Weeley* (1). The lessee of a coal mine who prepared the produce of the mine for market was held not to be a trader: *Port* v. *Turton* (2); nor the owner of a stone quarry, *Ex parte Gardner* (3); nor the lessee of an iron mine, *Ex parte Salkeld* (4), *Crawshay* v. *Collins* (5); nor a brickmaker, *Ex parte Burgess* (6), *Heane* v. *Rogers* (7). Reference was made to Shelford on Bankruptcy, 3rd Ed., pp. 123, 124.

Mr. *Dunne* in reply.—An indigo planter is not a farmer or an agriculturist, but he deals in indigo, and is a trader within the meaning of section 60. This was the basis of the decision in *In re King*.

(1) 7 East., 442.
(2) 2 Wils., 169.
(3) 1 Rose., 377.
(4) 3 Mont., D. and D., 125.
(5) 1 Swanst., 495.
(6) 2 Gl. and J., 183.
(7) 9 B. and C., 577.

1894

IN THE MATTER OF DE MOMET.

SALE, J.—In this case I think I ought to follow the course adopted in the case of *In re King*, who was described as "carrying on the trade and business of an indigo factory proprietor and dealer in indigo, lately residing at No. 3, Chowringhee Lane, in the town of Calcutta, but now residing at No. 21, Lindsay Street, in Calcutta, a European British subject." In that matter the insolvent obtained his personal discharge, and in due course applied under section 60 of the Indian Insolvent Act, first, for an order *nisi*, and, then, for an order absolute, for his final discharge. There being no opposition, the discharge was granted. The question whether he had properly described himself as a trader was not raised nor considered in that case. What constitutes a trader depends upon the definition given to that term in section 65, of the Statute 12 and 13 Victoria, cap. 106, which is rendered applicable to this country by section 9 of the Indian Insolvent Act. In the enumeration of traders given in section 65 of that Act are "persons using the trade of merchandize * * * * or who seek their living by buying and selling, * * * * or by the workmanship of goods or commodities." Now it was contended that following the profession of the proprietor of an indigo factory constitutes a person a trader within the words "persons using the trade of merchandise, or who seek their living by the workmanship of goods or commodities." It is said that the proprietor of an indigo factory in the ordinary course of his business produces a commodity—namely, indigo—for the purpose of selling it as such, and that he uses the trade of merchandise inasmuch as in the ordinary course of his trade or business he purchases the indigo plant, and then by the ordinary process well known in the indigo industry produces the commodity, indigo, by the sale of which he obtains a profit in his business. It is clear from some of the authorities which have been cited that a manufacturer who purchases the raw material, and then, by a process applied to such raw material, produces a finished article, is a trader; and I think that the cases cited show clearly that a person who merely produces an article from the soil, as for instance the owner of a stone quarry, is not a trader within the words of the section, because there is not that buying and selling necessary to constitute him a trader; and also because the

article which he produces and sells is not produced by "the workmanship of goods or commodities" as contemplated by the Act. I think therefore that the case of persons who deal in the natural products of the soil is distinguishable from the present case. It was also said that if the proprietor of an indigo factory be deemed to be a trader within the meaning of the section, so also must the proprietor of a tea garden, whose business it is to manufacture and sell tea. I am not required to decide whether the proprietors of tea estates do or do not come within the class of traders. When the case arises it is quite possible that it may be held that the produce of a tea garden—dried tea leaves—fulfil the description of articles produced "by the workmanship of goods or commodities" within the meaning of 12 and 13 Victoria, cap. 106, section 65, and that therefore such persons would be traders within the meaning of that Act. But whether or not dried tea leaves may or may not be deemed to be the production of "the workmanship of goods or commodities," the article indigo certainly is.

I think, therefore, I ought to hold that the insolvent, at the time he incurred the debt, the subject matter of this insolvency, was a trader within the meaning of section 60 of the Indian Insolvent Act. And I think also that it makes no difference that the business was conducted in the name not of the insolvent but of his partner Mr. Legge. The debt was a trade debt, and the mere fact that it was due to the partner makes no difference. The insolvent will therefore obtain a certificate in the usual form. The costs of the insolvent and of the opposing creditor will be paid out of the estate.

Attorneys for the insolvent: Messrs. *Orr, Robertson & Burton.*

Attorneys for the opposing creditor: Messrs. *Leslie Bros.*

J. V. W.

GENERAL INDEX.

PAGE

Abatement of Rent, Right to. *See* LANDLORD AND TENANT 1005

Accomplice—*Informer cognizant of offence—Omission to disclose commission of offence.*] Where an informer was, upon his own statement, cognizant of the commission of an offence, and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice; but held that his testimony was not such as to justify a conviction except where it was corroborated. ISHAN CHANDRA CHANDRA *v.* QUEEN-EMPRESS 328

Account directed by Decree in Mortgage Suit between Hindus. *See* INTEREST ... 840

Accounts between Co-sharers. *See* PRE-EMPTION 496

Accretion—*Regulation XI of* 1825, *section* 4 (*cl.* 1)—*Occupancy right—Jote tenure—Ryot*] A ryot who has a right of occupancy is entitled to the benefit of section 4 (clause 1) of Regulation XI of 1825. *Gobind Moneo Debia* v. *Dinabundhoo Shaha*, 15 W. R., 87; *Attimoollah* v. *Sahebullah*, 15 W. R., 149; and *Bhagabat Prasad Sing* v. *Durg Bijai Sing*, 8 B. L. R., 73; 15 W. R., 95, followed. *Finlay Muir and Co.* v. *Goree Kristo Gossamee*, 24 W. R., 404, not followed. GOURHARI KAIBURTO *v.* BHOLA KAIBURTO 233

Accused, Right of, to cross-examine witnesses before commitment. *See* WITNESS ... 642

——— **Statement of, before Magistrate.** *See* CRIMINAL PROCEDURE CODE, s 364 ... 642

Acknowledgment of Son. *See* MAHOMEDAN LAW, ACKNOWLEDGMENT ... 66[illegible]

Acts—

1839—XXXII. *See* INTEREST ... 274

1859—VIII. *See* CIVIL PROCEDURE CODE, 1859.

———X. *See* WITHDRAWAL OF SUIT 428, 514

———XI. *See* PUBLIC DEMANDS RECOVERY ACT, s. 2 350

——— ss. 5 and 7. *See* SALE FOR ARREARS OF REVENUE 354

——— s. 6. *See* SALE FOR ARREARS OF REVENUE 360, 844

PAGE

Acts—*continued.*

1859—XI. ss. 13, 14. *See* SALE FOR ARREARS OF REVENUE 844

——— ss. 17, 25. *See* SALE FOR ARREARS OF REVENUE 70

——— s. 33. *See* SALE FOR ARREARS OF REVENUE 70, 844

——— s. 34. *See* RIGHT OF SUIT ... 255

——— s. 36. *See* SALE FOR ARREARS OF REVENUE 575

———XIII, s. 2. *See* CRIMINAL BREACH OF CONTRACT 262

1860—XLV. *See* PENAL CODE.

1865—X. *See* SUCCESSION ACT.

1869—I. *See* OUDH ESTATES ACT.

1870—XXI. *See* HINDU WILLS ACT.

1871—IX, Art. 142. *See* LIMITATION ACT (XV of 1877), ART. 141 ... 8

1872—I. *See* EVIDENCE ACT.

———IX. *See* CONTRACT ACT.

1874—II. *See* ADMINISTRATOR-GENERAL'S ACT.

1875—IX. *See* MAJORITY ACT.

1876—XVIII. *See* OUDH LAWS ACT.

1877—III. *See* REGISTRATION ACT.

———XV. *See* LIMITATION ACT, 1877.

1879—I. *See* STAMP ACT.

1881—V. *See* PROBATE AND ADMINISTRATION ACT.

1882—IV. *See* TRANSFER OF PROPERTY ACT.

———X. *See* CRIMINAL PROCEDURE CODE, 1882.

———XIV. *See* CIVIL PROCEDURE CODE, 1882

———XV. *See* PRESIDENCY SMALL CAUSE COURTS ACT.

1885—VIII. *See* BENGAL TENANCY ACT.

1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.

1890—VIII. *See* GUARDIAN AND WARDS ACT, 1894.

1894—V. *See* CIVIL PROCEDURE CODE AMENDMENT ACT 940

PAGE

Act creating new rights Effect of *See* CIVIL PROCEDURE CODE S. 310A ... 910

——Repeal of effect of *See* BENGAL TENANCY ACT, S 19 129

Acting Manager of Bank, Verification of plaint by. *See* PLAINT 60

Actionable Claim *See* TRANSFER OF PROPERTY ACT, S 135 . 568, 792

Administration *See* LETTERS OF ADMINISTRATION 911

————Grant of, without determining title to property. *See* LETTERS OF ADMINISTRATION 344

————Suit for. *See* MAHOMEDAN LAW, DEBTS 311

Administration Suit, Suit in nature of an. *See* SECURITY FOR COSTS ... 832

Administrator-General's Act (II of 1874), section 31—*Transfer to Administrator-General by Hindu executor—Hindu Wills Act (XXI of 1870), section 5—Succession Act (X of 1865) sections 179, 187, 191—Probate and Administration Act (V of 1881)—Objects and reasons for Act, and Report of Select Committee on Bill*] *N. L. M.*, a Hindu, died on the 22nd February 1891, leaving property in Calcutta and leaving a will, dated 5th August 1889. The executors appointed by the will took out probate on the 17th March 1891 and on the 14th August 1893 executed a deed, by which they purported, under section 31 of the Administrator-General's Act II of 1874, to transfer all estates, effects, and interests vested in them to the Administrator-General of Bengal. *Held*, by PRINSEP and TREVELYAN, JJ., affirming the decision of SALE J. (PETHERAM, C.J., dissenting) that the transfer was not a valid one. The executor of a Hindu testator has no power to transfer the property of the testator to the Administrator-General under the terms of section 31 of Act II of 1874 That section applies only to the executors and administrators of persons of the class mentioned in section 16 of the Act, that is to say, persons not being Hindus, Mahomedans, or Buddhists. *Per* PETHERAM, C.J., *contra*—The transfer was a valid one Even if section 5 of the Hindu Wills Act XXI of 1870 were sufficient to prevent such transfer to the Administrator General under section 30 of the Administrator-General's Act of 1867, which is by no means certain, a Hindu executor has power, if not since the passing of the Hindu Wills Act, at any rate since the coming into force of the Probate and Administration Act (V of 1881), to transfer his interest and

PAGE

Administrator-General's Act—*continued*

estate under a will to the Administrator-General, as constituted under Act II of 1874. The course of legislation with reference to the creation of the office of the Administrator-General of Bengal, and to his duties and powers reviewed and considered in construing Act II of 1874. The history of the passing of an Act, and the intention of the Legislature in introducing it, though not admissible in England to explain a Statute, have been in this country taken into consideration in construing Acts of the Legislature. *Per* PRINSEP, J.—The objects and reasons given by the Legislature on the introduction of a bill, and the report of the Select Committee on it, may be referred to in construing any Act to show the intention of the Legislature in passing it. *Queen-Empress* v. *Kartick Chunder Das*, I. L. R., 14 Calc., 721, referred to. ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK ... 732

Adverse Possession *See* LIMITATION ACT, 1877, ART 141 8

Affray, Evidence as to. *See* RIOTING ... 392

Agreement not to execute Decree. *See* CIVIL PROCEDURE CODE, S 244 . 437

Alienation by Hindu Widow. *See* HINDU LAW, WIDOW ... 190

Aliens. Period of disability of minority for. *See* LETTERS OF ADMINISTRATION ... 911

Alternative Charges. *See* CHARGE TO JURY 955

Appeal. *See* BENGAL TENANCY ACT, SS. 53, 163 132

——*Bengal Tenancy Act (VIII of 1885, section 173—Order setting aside sale in execution of decree for rent*] No appeal lies from an order setting aside a sale under section 173 of the Bengal Tenancy Act. ROGHU SINGH v. MISRI SINGH ... 825

——*Order refusing to make person party defendant to an application for probate—Probate and Administration Act (V of 1881), ss 53 and 86—Exercise of power of High Court under s. 622 of the Civil Procedure Code, 1882, where there is no appeal—Superintendence of High Court*] Section 86, read with section 53, of the Probate and Administration Act (V of 1881) only allows an appeal to the High Court in cases in which an appeal is allowable under the Code of Civil Procedure. No appeal therefore lies against an order refusing to make a person opposing probate a party defendant to an application for probate. *Abirunnissa Khatoon* v. *Komurunnissa Khatoon*, I. L R., 13 Calc, 100, and *Karman Bibi* v. *Misri Lal*, I L.

PAGE

Appeal—*continued.*

R., 2 All., 904, followed. Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court, finding no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civil Procedure Code, and remanded the case for trial as a contested application. KHETTRAMONI DASI *v.* SHYAMA CHURN KUNDU 539

—— **Execution of decree set aside on** *See* EXECUTION OF DECREE 340

—— **Grounds of.** *See* SECOND APPEAL ... 501

—— **Rejection of, without reasons.** *See* JUDGMENT 92

—— **Revivor of abated.** *See* OUDH ESTATES ACT, s. 22 997

—— **to Privy Council**—*Civil Procedure Code (Act XIV of 1882), ss. 568-596—Additional evidence in Appellate Court—Costs—Power of Judge sitting to hear applications for leave to appeal to Privy Council.*] The test as to whether additional evidence should be received in an Appellate Court under s 568 of the Code of Civil Procedure depends upon the question whether or no the Appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause"; as to this the Appellate Court is to be the sole judge. The rejection of an application under that section cannot be said to involve any "substantial question of law" within the meaning of section 596 of the Code, so as to give the right to an appeal to the Privy Council. IN THE GOODS OF PREM CHAND MOONSHEE. UPENDRA MOHAN GHOSE *v.* GOPAL CHANDRA GHOSE 484

—— *Civil Procedure Code, 1882, ss. 596, 600—Finding of facts not concurrent but in effect the same—Case in which no question of law is involved*] Where there is no point of law involved in a case, the mere fact that the finding of the Appellate Court does not in terms coincide with the finding of the Original Court is not sufficient, where the findings of fact of the two Courts are in effect the same, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is more than Rs. 10,000. *In the matter of the petition of Ashgar Reza*, I. L. R., 16 Calc., 287, distinguished. THOMSON *v.* CALCUTTA TRAMWAYS COMPANY ... 523

—— **Record of.** *See* PRACTICE ... 476

Appellate Court, Additional Evidence in. *See* APPEAL TO PRIVY COUNCIL 484

—— **Duty of.** *See* WILL ... 279

—— **Judgment of.** *See* JUDGMENT 92

—— **Powers of in cases where there has been misdirection.** *See* CHARGE TO JURY 955

Application against several Tenants. *See* BENGAL TENANCY ACT, S. 154 ... 602

—— **by person not party to suit.** *See* COSTS 934

—— **Verification of.** *See* CIVIL PROCEDURE CODE, s. 235 818

Apportionment of Rent. *See* LANDLORD AND TENANT 1005

Arbitration—*Private arbitration—Application to file private award—Objection to award, Effect of—Power of Court—Civil Procedure Code, ss. 520, 521, 525, 526*] *Held* by the Full Bench (PETHERAM, C.J. and PRINSEP, PIGOT, MACPHERSON, and GHOSE, JJ.)]. Where an application is made to a Court for filing a private award and objections are raised in a verified written statement, and the objections are such as fall within section 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but it is the duty of the Court to inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not. *Per* PRINSEP, PIGOT, and MACPHERSON, JJ.—Where on such an application an objection is taken that the matters in dispute were never referred to arbitration and is therefore not on the grounds mentioned in section 521 the Court has no jurisdiction to deal with it, but should reject the application and refer the parties to a regular suit. SURJAN RAOT *v.* BHIKARI RAOT ... 213

—— *Submission to arbitration—Award not disposing of all the matters referred—Finality of award—Validity of award—Waiver—Consent of parties.*] The ground for holding an award to be invalid on account of its not disposing of all the matters referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators. The partition of joint estate consisting of

PAGE

Arbitration—*continued.*

different properties having been submitted to arbitration and the parties agreeing to a division being made by steps and that each division should be final, without any condition that the award should not be final while part remained undivided: *Held* in a suit brought by one of the parties for partition of the whole estate, after such a division of part, that although cases cited as to the invalidity of an incomplete award might have been applicable had the arbitrators awarded as to only part of the property of their own authority and without that of the parties, it was competent to the latter to agree before the arbitrators to the division being made as it had been; and that here the partition as to the property divided was final. Only a decree for the partition of the undivided residue could be made. MAKUND RAM SUKUL *v.* SALIQ RAM SUKUL 590

Arrears of rent, Suit for. *See* BENGAL TENANCY ACT, ss. 53, 153 132

Assessment to Tax. *See* BENGAL MUNICIPAL ACT, s. 85 819

Assignment of Mortgage. *See* TRANSFER OF PROPERTY ACT, s 135 792

Attachment—*Attachment of money in hands of Receiver—Attachment made without sanction of Court—Civil Procedure Code (Act XIV of 1882), s. 272.*] An attachment of money in the hands of the Receiver made without previous permission or sanction of the Court for such attachment is improper and irregular, and the Court will refuse to recognize it. *Khan* v. *Alli Mahomed Haji Umer*, I. L. R., 16 Bom., 577, followed. MAHOMMED ZOHURUDDEEN *v.* MAHOMMED NOOROODDEEN ... 85

——**Absence of.** *See* EXECUTION OF DECREE 639

——**by Collector, Exemption from sale of land under.** *See* SALE FOR ARREARS OF REVENUE 70

——**by Small Cause Court.** *See* SALE IN EXECUTION OF DECREE 200

Attendance in Court. *See* PARDA NASHIN LADY 588

Attorney and Client—*Lien of attorney for costs—Application for costs to be paid out of money in hands of Receiver in the suit—Regular suit—Practice.*] The attorneys for the plaintiff claimed a lien, on the amount in the hands of the Receiver of the Court to the credit of the plaintiff in a partition suit, for the costs of the suit which had been secured by the deposit with the attorneys of the title deeds of the plaintiff's family

PAGE

Attorney and Client—*continued.*

dwelling house which formed a portion of the property sold by the Receiver under the decree in the suit. *Held* on an application by the attorneys for payment to them of such costs, that the lien could not be given effect to in summary proceedings of this nature, but should form the subject of a regular suit. Except in such a suit it is not the practice of the Court to make any order for payment of costs between an attorney and his client. *Doman* v. *Emaum Ally*, I. L. R., 7 Calc., 401, followed. MAHOMMED ZOHURUDDEEN *v* MAHOMMED NOOROODDEEN 85

Auction Purchaser, Effect of omission to give notice of execution. *See* EXECUTION OF DECREE 19

Autrefois Convict. *See* CRIMINAL BREACH OF CONTRACT 262

Average rate of Rent. *See* BENGAL TENANCY ACT, s. 30 986

Award, Application to file. *See* ARBITRATION 213

——**not disposing of all the matters referred.** *See* ARBITRATION ... 590

——**Validity of.** *See* ARBITRATION . 590

Bank, Verification of plaint by Acting Manager of. *See* PLAINT 60

Basti land. *See* CALCUTTA MUNICIPAL CONSOLIDATION ACT, 1888, s. 2 ... 528

Benami Purchase—*Certified purchaser—Civil Procedure Code, 1882, s. 317—Suit by execution creditor for declaration that property is liable to be sold in execution of decree as belonging to his debtor.*] The plaintiff lent money to *F* on a bond, and after his death sued his representative to recover the money out of the deceased's assets, and obtained a decree, in execution of which he attached certain property. *S* preferred a claim to the property on the ground that she was the purchaser of it at an execution sale, and it was released. The plaintiff then brought a suit against *S* and *F's* representative for a declaration that the property was the property of his debtor *F*, and was therefore liable to be sold in execution of his decree. *Held*, that the suit was not barred by s. 317 of the Civil Procedure Code. *Kanizak Sukina* v. *Monohur Das*, I. L. R., 12 Calc., 204; *Seetanath Ghose* v. *Madhub Narain Roy Chowdhry*, 1 W. R., 329; *Khyrat Ali* v. *Syfulluh Khan*, 8 W. R., 130; *Sohun Lall* v. *Lala Gya Pershad*, 6 N. W., 265; and *Paran Mal* v. *Ali Khan*, I. L. R., 1

PAGE

Benami Purchase—*continued.*

All, 235, followed. *Rama Kurup* v *Sridevi*, I. L. R., 16 Mad., 290, dissented from. SUBHA BIBI *v.* HARA LAL DAS. 519

Benamidar, Purchase by, for Judgment-Debtor. *See* BENGAL TENANCY ACT, s. 173 552

Bengal Act, 1868—VII. *See* SALE FOR ARREARS OF REVENUE 70

——————s. 8. *See* PUBLIC DEMANDS RECOVERY ACT, s. 2 350

——————s. 11. *See* SALE FOR ARREARS OF REVENUE 360

——————1870—VIII, ss. 48, 64. *See* LIMITATION ACT, 1877, Art. 14 ... 622

——————1875—V. *See* BENGAL SURVEY ACT.

——————1876—IV. *See* CALCUTTA MUNICIPAL ACT, 1876.

——————1876—V. *See* BENGAL MUNICIPAL ACT 1876.

——————1880—VII. *See* PUBLIC DEMANDS RECOVERY ACT.

——————IX. *See* BENGAL CESS ACT.

——————1884—III. *See* BENGAL MUNICIPAL ACT, 1884.

——————1888—II. *See* CALCUTTA MUNICIPAL CONSOLIDATION ACT, 1888.

Bengal Cess Act (Bengal Act IX of 1880). *See* SALE FOR ARREARS OF REVENUE ... 70

Bengal Municipal Act (Bengal Act V of 1876), section 313—*Bye-law— "Ultra vires"—Bengal Municipal Act (Bengal Act III of 1884), section 2.*] Where a Municipality passed a bye law purporting to be made under the provisions of section 313 of Bengal Act V of 1876, which was duly sanctioned by the local Government, to the effect that persons failing to trim trees overhanging tanks which were likely to foul the water with their falling leaves, after service of notice on them to that effect, should be liable to a penalty, and where subsequent to the repeal of that Act by Bengal Act III of 1884 a person was convicted and fined for having disobeyed such bye-law: *Held*, that the conviction was bad, as the bye-law was not one authorised by the terms of section 313, and was consequently *ultra vires*, and that section 2 of Bengal Act III of 1884 could not make valid a bye-law which was originally invalid. BENI MADHUB NAG *v.* MATI LAL DAS 837

——————(Bengal Act III of 1884), s 2. *See* BENGAL MUNICIPAL ACT, 1876, s 313 837

PAGE

Bengal Municipal Act (Bengal Act III of 1884)—*continued.*

ss. 85, 87, 91, 92, 112, 113, 116—*Persons occupying holdings—Liability to assessment—Municipal Commissioners' power to tax—Assessment to tax.*] The word "liability" in the 2nd paragraph of section 113 of Bengal Act III of 1884 means liability apart from the question of occupation and must be taken to refer to the liability to assessment or rating of a person who is the occupier of a holding. The same restricted meaning must be placed upon the word "liability" in section 116, which section has no application to a dispute as to whether a person assessed to a tax does or does not occupy a holding; and a suit brought to set aside an assessment on the ground that the person assessed does not occupy a holding is not therefore barred by the provisions of section 116. DWARKA NATH DUTT *v.* ADDYA SUNDARI MITTRA 319

Bengal Survey Act (Bengal Act V of 1875), Part V, s. 40. *See* SECOND APPEAL ... 935

Bengal Tenancy Act (VIII of 1885), s. 3 clause 5, 65, 161—*Sale of tenure for arrears of road cess under decree—"Rent"—Road Cess—Cesses—Incumbrance by defaulting tenant, Effect of sale in execution of decree for road cess on.*] The word "rent" in section 65 of the Bengal Tenancy Act, 1885, includes road cess payable by the landlord. A tenure-holder granted a usufructuary mortgage of certain lands within his tenure to *A*, and directed the tenants to pay their rents to him. Subsequently the superior landlord brought a suit for road cess against the tenure-holder, and in execution of his decree sold the tenure under section 65 of the Bengal Tenancy Act. *A* then brought a suit against one of the tenants for arrears of rent, and contended that all that passed under the auction sale was the right, title and interest of the tenure-holder, and that his rights under the mortgage were unaffected by the sale, and that he was still entitled to the rent: *Held*, that Chap. XIV of the Bengal Tenancy Act must be read with section 65 of the Act, and that, having regard to the definition in clause 5 of section 3, "rent," as used in that section, includes road cess payable by the tenant, and that the sale was a sale of the tenure the purchaser acquiring the property free from the incumbrance created by the tenure-holder in favour of *A*, it not being a registered and notified incumbrance within the meaning of section 161 of the Act. NOBIN CHAND NUSKAR *v.* BANSENATH PARAMANICK 722

PAGE

Bengal Tenancy Act (VIII of 1885)—*contd.*

——————————ss 17, 18.

See LANDLORD AND TENANT ... 433

——————————s. 19—

Ryot, Definition of—Right of occupancy—Occupancy for horticultural purposes—Statutory right, effect on, of repeal of Act which gives it.] Where a right of occupancy had been acquired under the old Tenancy Act (Bengal Act VIII of 1869) which is repealed by the Bengal Tenancy Act (VIII of 1885): *Held*, that apart from the provisions of s. 19 of the latter Act, such right of occupancy was not forfeited by the repeal, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired. *Semble.*—The definition of "ryot" in the Bengal Tenancy Act (VIII of 1885) is not exhaustive, and there is nothing in that definition which would exclude a person who had taken land for horticultural purposes. HURRY RAM v. NURSINGH LAL 129

——————————s. 22, clause 2—*Transfer of occupancy right and purchase by some of several co-sharer landlords—Merger—Right of other co-sharer landlords to rent*] The acquisition of an occupancy right by a proprietor does not, under sub section (2) of section 22 of the Bengal Tenancy Act, affect the right of a co-sharer landlord to receive his share of the rent of the tenancy. The "third person" mentioned in that sub-section includes every person interested other than the transferor and transferee. SITANATH PANDA v. PELARAM TRIPATI ... 869

——————————s. 30, clause (a)—*Suit for enhancement of rent—Prevailing rate, Meaning of—Average rate*] The words "prevailing rate" in section 30, clause (*a*) of the Bengal Tenancy Act, mean, not the average rate of rent, but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859. SHITAL MONDAL v. PROSSONNAMOYI DEBYA ... 986

——————————ss. 53, 153—*Suit for arrears of rent—Dâk cess when considered as rent—Appeal where subject matter under value of Rs. 100.*] Where *dâk* cess is claimed under the contract by which the rent is payable, it must be regarded as rent, *i.e.*, as part of what is lawfully payable in money for use and occupation of the land held by the tenant, and where there is a dispute with regard to such *dâk* cess, the amount of rent is in dispute, and an appeal lies, though the amount in dispute is less than Rs. 100, and notwithstanding the provisions of section 153 of the Bengal Tenancy Act. The established usage of the locality, and not the usage between the parties, is that contemplated by section 53 of the Bengal Tenancy Act. *Hira Lal Das* v. *Mathura Mohun Roy*, I. L. R., 15 Calc., 714, followed. WATSON AND COMPANY v. SREE-KRISTO BHUMICK 132

——————————s. 55.

See BENGAL TENANCY ACT, s. 108 ... 521

——————————s. 61—

Deposit of rent in Court—Bonâ fide doubt of tenant as to who is entitled to rent—Costs, where conduct of defendant did not make litigation necessary] The deposit of rent in Court under section 61 of the Bengal Tenancy Act (where the tenant entertains a *bonâ fide* doubt as to who was entitled to receive it) operates as an acquittance; and where such deposit is proved as a defence to a suit for rent, the suit should be dismissed. Where in such a suit the defendant is found to have been not to blame for the litigation, he is entitled to his costs. STALKARTT v. GURU DAS KUNDU CHOWDHRY 680

——————————ss. 65 and 169 *See* SALE FOR ARREARS OF RENT 169

——————————s. 88.

See LANDLORD AND TENANT ... 433

——————————ss. 101, 102—*Power of Settlement Officer—Proceedings in preparation of record of rights—Decision as to validity of lakhiraj titles—Power of Revenue Officer to declare land claimed as lakhiraj liable to rent.*] *Held* by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.):—In preparing a record of rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent, *Gokhul Sahu* v. *Jodu Nundun Roy*, I. L. R., 17 Calc., 721, referred to. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH, SECRETARY OF STATE FOR INDIA IN COUNCIL v. BAIKUNT NATH PRODHAN, SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAM TARUCK DAS 38

——————————ss. 101, 102—*Record of Rights case—Settlement Officer's decision—Subsequent civil suit—Res judicata.*] A decision by

PAGE

Bengal Tenancy Act (VIII of 1885)—*contd.*

a Settlement Officer under Chapter X of the Bengal Tenancy Act as to which of two persons claiming to be tenant ought to be recorded as such does not operate as *res judicata* in a subsequent civil suit between the same parties concerning the title to the land. PANDIT SARDAR *v.* MEAJAN MIRDHA 378

ss.

104, cl. 2, 106, 107, 108, Chap. X. *See* SECOND APPEAL 776

ss.

105, 106. *See* BENGAL TENANCY ACT, s. 108 521

ss.

106, 108. *See* SECOND APPEAL ... 935

s.

108—*Record of rights—Appeal to Special Judge—Publication of record of rights—Bengal Tenancy Act, ss.* 55, 105, 106.] There is nothing in section 108 of the Bengal Tenancy Act which limits the jurisdiction of a Special Judge to deal only with matters of objection taken after publication of the record of rights. DURGA CHURN LASKAR *v.* HURI CHURN DAS 521

ss.

143, 144, 148. *See* BENGAL TENANCY ACT, SCH. III, CL. 6 387

s.

158—*Application for enhancement of rent when no settlement proceedings are in operation.*] The Court in dealing with an application under section 158 of the Bengal Tenancy Act cannot pass a decree for enhancement of the rent. Where therefore a landlord seeks to enhance the rent of his tenant when no settlement proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of an application under section 158. RAJESHWAR PERSHAD SINGH *v.* BURTA KOER ... 807

s.

158—*Tenure, Incidents of—Tenants. Applications against several—Form of Petition—Practice.*] Section 158 of the Bengal Tenancy Act does not authorize one application being made against a number of tenure-holders having separate and distinct tenures. The proper procedure is by separate applications against each. GOLAP CHAND NOWLAKHA *v.* ASHUTOSH CHATTERJEE 602

s.

173 *See* APPEAL 825

s.

173—*Sale for arrears of rent—Purchase by benamidar for judgment-debtor—Sale void or voidable—Suit to set aside sale—Proper Court to decide whether sale should stand or not.*] Where a sale takes place under the Bengal Tenancy Act in execution of a decree for arrears of rent, and the purchaser is found to be a mere *benamidar* for the judgment-debtor: *Held*, in a suit to set aside the sale on that ground, that on the wording of section 173 the sale was only voidable and not absolutely void: that section leaves it in the discretion of the Court to set aside the sale or not as it thinks fit. Under that section the proper Court to determine whether the sale should stand or not is the Court that held the sale. GOPAL CHUNDER MITRA *v.* RAM LAL GOSHAIN 554

Sch.

III, Cl. 6—*Limitation—Decree in suit for rent—Execution of decree—Final decree—Execution proceedings struck off—Bengal Tenancy Act (VIII of* 1885) *ss.* 143, 144, 148.] Having regard to ss. 143, 144 and 148 of the Bengal Tenancy Act, there is a special procedure laid down for rent suits, and therefore decrees in rent suits are decrees under Art. 6 of Sch. III of that Act. The words "final decree" in Article 6, Sch. III. of the Bengal Tenancy Act, refer to the final decree in the suit, and cannot be held to include an order of an Appellate Court made in an application to set aside that decree under s. 108 of the Code of Civil Procedure. An *ex-parte* rent decree having been obtained on the 30th May 1888 for a sum under Rs. 500, the decree-holder on the 27th May 1889 applied for execution thereof and attached certain properties of the judgment-debtor, the date fixed for the sale being the 31st August 1889. The judgment-debtor applied under s 108 of the Civil Procedure Code for a rehearing of the rent suit, and on the day fixed for the sale applied for stay of execution: the sale was stayed, and the Court of its own motion and for its own convenience directed the execution case to be struck off the file "for the present." On the 28th December 1889 the Court passed an order refusing a rehearing of the suit, which order was upheld on appeal on the 16th May 1890. On the 21st January 1892 the decree-holder again applied for execution at the same time praying that his application might be taken to be in continuation of his former application of the 27th May 1889. *Held*, that the application was one in continuation of the former proceedings in execution, so far at least as regarded the property mentioned in the former application, but as regards other properties, it must be held to be

PAGE

Bengal Tenancy Act (VIII of 1885)—*contd.*

barred as not having been made within three years from the decree of the 30th May 1883. RAIKANTA NATH MITTRA *v.* AUGHORE NATH BOSE ... 387

Bond, Registration of. *See* MINOR ... 87:

Boundary—*Question of boundary—Evidence in cases of disputed boundary—Onus probandi*] On questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the Court in ascertaining the true line. LUKHI NARAIN JAGADEB *v.* JODU NATH DEO 504

Boundary Dispute. *See* SECOND APPEAL ... 935

British Seaman. Trial of for offence committed on British Ship on High Seas. *See* JURISDICTION OF CRIMINAL COURT ... 782

Bye-Law *See* BENGAL MUNICIPAL ACT, 1876, s. 313 837

Calcutta Municipal Act (Bengal Act IV of 1876), ss. 280 281, 282 *See* CALCUTTA MUNICIPAL CONSOLIDATION ACT, 1888, s. 2 528

Calcutta Municipal Consolidation Act (Bengal Act II of 1888) ss. 2 252 256. 257, 265—*Calcutta Municipal Act (Bengal Act IV of 1876), ss, 28', 280 28!—Basti land—Urgency—Trespass—Suit for damages.*] Section 2, paragraph 5 of Bengal Act II of 1888, the Calcutta Municipal Consolidation Act (by which Act the former Calcutta Municipal Act Bengal Act IV of 1876 is repealed) provides that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been *commenced* under the new Act; but though commenced before the passing of the new Act they must to be effectual, be continued under its provisions, and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them. Where therefore before the passing of Act II of 1888, and whilst Act IV of 1876 was in force, the Municipality took measures under the latter Act to cleanse *basti* land which was in an insanitary state, and notwithstanding the passing of Act II of 1888, which provided totally different preliminaries and procedure for the purpose, continued the improvements practically under the Act of 1876, *Held* that even if the proceedings could be considered, under section 3 of Act II of 1882 to have been commenced under the new Act, the action of the Municipality amounted to trespass for which they were liable in damages to the owner of the land. CORPORATION OF CALCUTTA *v.* JADU LALL MULLICK 528

PAGE

Calcutta Municipal Consolidation Act—*contd.*

Cantonment of Secundarabad. *See* SECURITY FOR COSTS 177

Case—

ABIRUNISSA KHATOON *v.* KOMURUNNISSA KHATOON, I. L. R., 13 Calc., 100, followed 539

ASHGHAR REZA, IN THE MATTER OF THE PETITION OF, I. L. R, 16 Calc, 287, distinguished 523

ASHRUFF OOD-DOWLA AHMED HOSSEIN *v.* HYDER HOSSEIN KHAN, 11 Moo. I. A., 94, referred to and followed 666

ASMUTULLAH DALAL *v.* KALLY CHURN MITTER, I. L. R., 7 Calc., 56, referred to 542

ATTIMOOLLAH *v.* SAHEBOOLLAH, 15 W. R., 149, followed 233

BHAGABAT PRASAD SING *v.* DURG BIJAI SING, 8 B. L. R., 73; 16 W. R., 95, followed 233

BHUGWAN DASS BOGLA *v.* BUNKO BEHARY BAJPIE, unreported, followed... ... 200

BIR NARAIN PANDA *v.* DARPA NARAIN PRODHAN, I. L. R., 10 Calc., 74, referred to 542

BYKANT NATH SHAHA *v.* RAJENDRO NARAIN RAI, I. L. R., 12 Calc., 333, followed 200

CHANDRA KAMAL DAS *v.* BISSESSURREE DASSIA, 13 C. L R., 243, dissented from 512

CHENIBASH SHAHA *v.* SRIDAM MANDAL, I. L. R., 5 Calc., 97 referred to ... 542

CHIMNAJI GOBIND GODBOLE *v.* DINKAR DHOMDEV GODBOLE, I. L. R., 11 Bom., 320, followed 190

DEB NARAIN DUTT *v.* NARENDRA KRISHNA, I. L. R., 16 Calc., 267, referred to ... 940

DEGUMBARI DABI *v.* AUSHOOTOSH BANERJEE, I L. R., 17 Calc., 613, approved of 882

DIRGOPAL LALL *v* BOLAKEE, I. L. R., 5 Calc., 269, referred to 116

DOMUN *v.* EMAUN ALLY, I. L. R., 7 Calc., 401, followed 85

DOWLATH BEE *v.* SHAIK ALI, 5 Mad. H. C., 473, followed 97

FINLAY, MUIR AND COMPANY *v.* GOPEE KRISTO GOSSAMEE, 24 W. R., 494, not followed 233

GOBIND LAL ROY *v.* RAMJANAM MISSER, I. L R., 21 Calc., 70, followed ... 844

PAGE

Case—*continued.*

GOBIND MONEE DEBIA *v.* DINABUNDHOO SHAHA, 15 W. R., 87, followed ... 233

GODHA *v.* NAIK RAM, I. L. R., 7 All., 152, relied on 430

GOPEE NATH ACHARJE *v.* ACHCHA BIBEE, I. L. R., 7 Calc., 553, followed ... 200

GOPI MOHAN ROY *v.* DOYBAKI NUNDUN SEN, I. L. R., 19 Calc., 13, followed ... 639

HIRA LAL *v.* BHAIRON, I. L. R., 5 All., 602, *dictum* of Stuart, C. J., in, dissented from 180

HIRA LAL DAS *v.* MOTHURA MOHUN ROY, I. L R., 15 Calc., 714, followed ... 132

HURENDRO NARAIN SINGH CHOWDHRY *v.* BHOBANI PREA BARUANI, I. L. R., 11 Calc., 762, followed 29

IMAMUNNISSA BIBI *v.* LIAKAT HUSAIN, I. L. R., 3 All., 424, followed... ... 19

JAGAN NATH GORAI *v.* WATSON, I. L. R., 19 Calc , 341, distinguished 605

JANI BEGAM *v.* JAHANGIR KHAN, I. L. R., 9 All., 476, approved of 568

JUDISTIR PATRO *v.* NOBIN CHANDRA KHELA, I. L. R., 13 Calc., 78, referred to 542

KAHN *v.* ALLI MAHOMED HAJI UMER, I. L. R., 16 Bom., 577, followed ... 85

KALIANASUNDRAM *v.* EGNAVEDESWARA, I. L. R., 11 Mad. 261, referred to ... 989

KANIZAK SUKINA *v.* MONOHUR DAS, I. L. R., 12 Calc., 204, followed ... 519

KARMAN BIBI *v.* MISRI LAL, I. L. R., 2 All., 904, followed 539

KASIMUNNISSA BIBEE *v.* NILRATNA BOSE, I. L. R., 8 Calc., 79, referred to ... 116

KEWAL RAM *v.* KHADUNI HUSAIN, I. L. R., 5 All., 576, followed 23

KHYRAT ALI *v.* SUFULLAH KHAN, 8 W. R., 130, followed 519

KOKIL SINGH *v.* DULI CHUND, 5 C. L. R., 243, referred to 116

LALA GAURI SANKER LAL *v.* JANKI PARSHAD, I. L. R., 17 Calc., 809 ; L. R., 17 I. A., 57, referred to 70

LALA KIRAT NARAIN *v.* PALAKDHARI PANDEY, I. L. R., 17 Calc., 826, referred to 776

LAL MOHUN MUKERJEE *v.* JOGENDRA CHUNDER ROY, I. L. R., 14 Calc., 636, referred to 940

MAKIN *v.* ATTORNEY-GENERAL OF NEW SOUTH WALES, L. R. (1894), A. C., 57, referred to 955

MOHENDRO NARAIN CHATURAJ *v.* GOPAL MONDUL, I. L. R., 17 Calc., 769, distinguished 605

PAGE

Case—*continued.*

MON MOHUN ROY *v.* DURGA CHURN GOOEE, I. L. R., 15 Calc., 502, referred to ... 542

MOOKOOND LALL PAL CHOWDHRY *v.* MAHOMED SAMI MEEAH, I. L. R., 14 Calc., 484, referred to 989

MUCHIRAM BARIK *v.* ISHAN CHUNDRA CHUKERBUTTI, I. L. R., 21 Calc., 568, followed 792

MUTTALAGIRI NAYAK *v.* MUTTAYAR, I. L. R., 6 Mad., 357, not followed 200

MUTTY JAN *v.* AHMED ALLY, I. L. R., 8 Calc., 370, principle in, followed .. 311

NANACK CHAND *v.* TELUCKDYE KOER, I. L. R., 5 Calc., 265 ; 4 C. L. R., 358, referred to 116

NEWAZ ALI *v.* RAM BALLABH CHAKRAVARTI, I. L. R., 21 Calc., 916 note ... 915

NILAKANTA *v.* KRISHNASAMI, I. L. R., 13 Mad., 225, approved of 568

NILMADHUB CHUKERBUTTY *v.* RAMSODOY GHOSE, I. L. R., 9 Calc., 857, referred to 542

NIMBAJI TULSIRAM *v.* VADIA VENKATI, I. L. R., 16 Bom., 683, not followed ... 200

NOBIN CHUNDER BANERJEE *v.* ROMESH CHUNDRA GHOSE, I. L. R., 14 Calc., 781, referred to 840

PERTAB NARAIN SINGH *v.* SUBBAO KOOER, I. L. R., 3 Calc., 646 ; L. R., 4 I. A., 228, referred to 997

PREM CHAND DEY *v.* MOKHODA DEBI, I. L. R., 17 Calc., 699, distinguished ... 639

PURAN MAL *v.* ALI KHAN, I. L. R., 1 All., 235, followed 519

PURSHOTAM DASS *v.* MAHANANT SURAJBHARTHI, I. L. R., 6 Bom., 588, approved 809

QUEEN *v.* GOPAL DASS, I. L. R., 3 Mad., 271, followed 392

QUEEN-EMPRESS *v.* GANU SONBA, I. L. R., 12 Bom., 440, followed 392

QUEEN-EMPRESS *v.* KARTICK CHUNDER DAS, I L. R., 14 Calc., 721, referred to ... 732

RADHA PERSHAD MISSER *v.* MONOHUR DAS, I. L. R., 6 Calc., 317, referred to ... 116

RAJA OF PITTAPUR *v.* VENKATA MAHIPATI SURYA, I. L. R., 8 Mad., 520 ; L. R., 12 I. A., 119, followed 157

RAJENDRA NARAIN BAGCHI *v.* WATSON & Co., I. L. R., 18 Calc , 510, referred to ... 568

RAMA KURUP *v.* SRIDEVI, I. L. R., 16 Mad., 290, dissented from 519

RAM CULPO BHATTACHARJI *v.* RAM CHUNDER SHOME, I. L. R., 14 Calc., 352, referred to 524

PAGE

Case—*continued.*

RAMESHURI DASSEE *v.* DOORGA DASS CHATTERJEE, I. L. R., 6 Calc., 103, referred to 19

SEETANATH GHOSE *v.* MADHUB NARAIN ROY CHOWDHURY, 1 W. R., 329, followed 519

SEWBUX BOGLA *v.* SHIB CHUNDER SEN, I. L. R., 13 Calc., 225, approved ... 809

SHEWBARAT KOER *v.* NIRPAT ROY, I L. R., 16 Calc., 596, referred to 776

SHIBOO NARAIN SINGH *v.* MUDDENALLY, I. L. R., 7 Calc., 608, relied on ... 430

SOHUN LALL *v.* LALA GYA PERSHAD, 6 N. W., 265, followed 519

SOORJOMONEE DAYEE *v.* SUDDANUND MOHAPATTER, 12 B. L. R., 304; L. R. I. A., Sup. Vol., 212 referred to 430

TARINI PRASAD CHATTERJEE *v.* BHOLANATH MOOKERJEE, I. L. R., 21 Calc., 190 note, followed 190

TUPSEE SINGH *v.* RAM SARUN KOERI, I. L. R., 15 Calc., 376, referred to 910

UZIR ALI *v.* RAM KOMAL SHAHA, I. L. R., 15 Calc., 383, referred to 940

Caste Questions, Suit relating to. *See* JURISDICTION OF CIVIL COURT 463

Cause of Action. *See* JURISDICTION OF CIVIL COURT... 463

——————— *See* RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM 157

Certificate of Sale. *See* PUBLIC DEMANDS RECOVERY ACT, s. 2 350

Certified Purchaser. *See* BENAMI PURCHASE 519

——————**Suit to oust.** *See* SALE FOR ARREARS OF REVENUE 375

Cesses. *See* BENGAL TENANCY ACT, s. 3 ... 722

Charge, Defect in. *See* CRIMINAL PROCEDURE CODE, s. 439 827

Charge on Mortgaged Property. *See* INTEREST 274

Charge to Jury—*Misdirection—Appeal Court, Power of, in case of trial by jury when there has been misdirection—Rioting—Common object—Alternative charges—Criminal Procedure Code (X of 1882), ss.* 236, 303, 418, 423 *and* 537.] An accused in a trial by Jury is entitled to the verdict of the Jury, on questions of fact, and where a verdict is vitiated owing to misdirection by the Judge, the Appeal Court has no option but to set aside the verdict and direct a retrial. Were the Appeal Court to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the Jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appeal Court can only arrive at a decision on the perusal of the evidence. *Makin v. Attorney-General of New South Wales*, L. R. (1894) A. C. 57, referred to. Section 537 of the Code of Criminal Procedure does not warrant an Appeal Court, in a case where there has been misdirection in a charge to a Jury, going into the evidence with a view to decide whether there is sufficient evidence to justify a conviction. Under section 418 an appeal in a case tried by Jury lies on matters of law only, and the Appeal Court has no power to try the accused on matters of fact. The word "erroneous" in clause (*d*) of section 423 must not be read as "wrong on the facts," but must be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. Fourteen accused were charged with rioting armed with deadly weapons, and with murder and causing grievous hurt during such riot. The common object alleged by the prosecution was to compel the payment of certain money by one of the persons of the opposite party. Some of the accused who admitted their presence at the scene of the occurrence stated that they had been attacked on account of an allegation being made that one of the opposite party had enticed away another's wife, and that they had merely acted in self-defence. The case was tried before a Jury, and on the close of the case for the prosecution the Sessions Judge, considering that possibly the common object alleged by the prosecution might be considered not to have been proved, amended the charge and added an alternative common object to it, *viz.*, that the object of the assembly was to punish one of the opposite party for enticing away another's wife. There was no evidence on the record to prove the alternative common object, it being based solely on a portion of the statements of some of the accused, and the Sessions Judge put it to the Jury that it was an inference that could possibly be drawn from the evidence, but it was for them to draw that inference or not. The Jury convicted all the accused without specifying which common object they relied on, and were not asked, under section 303 of the Code of Criminal Procedure, any question for the purpose of ascertaining what their verdict was based on. *Held*, that the Judge had misdirected the Jury, and that the verdict

PAGE

Charge to Jury—*continued.*

of the Jury leaving it uncertain what was the common object which actuated the accused, it was bad in law, and that the conviction must be set aside and the case retried. *Held*, further, that it was unfair to use a part of the statements of some of the accused put forward in their defence as justifying the use of force by them in repelling the attack of the opposite party for the purpose of showing a common object as against them, and that the statements should have been taken in their entirety and could not in any event be used as against the rest of the accused. *Held*, further, that if the Sessions Judge was of opinion that there were grounds for charging the accused with a common object other than that alleged by the prosecution, his proper course was not to amend the charge but to add a separate count or counts to the charge upon which a separate verdict could be taken. Section 236 of the Code of Criminal Procedure only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not where there may be a doubt as to the facts which constitute one of the elements of the offence. WAFADAR KHAN *v.* QUEEN-EMPRESS 955

Civil Procedure Code (Act XIV of 1882),

s. 11. *See* JURISDICTION OF CIVIL COURT 463

s. 13. *See* RES JUDICATA 252

s. 13. *See* WITHDRAWAL OF SUIT ... 265

s. 19. *See* EXECUTION OF DECREE ... 639

s. 30. *See* PARTIES 180

s. 43 *See* RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM ... 157

s. 51. *See* PLAINT 60

s. 108. *See* SALE IN EXECUTION OF DECREE 605

ss. 108 and 157—*Ex-parte decree—Presidency Small Cause Court Act (XV of 1882), s. 37—Limitation Act (XV of 1877), Schedule II, Art. 164—New trial.*] There is a distinction made by the Code of Civil Procedure between cases decided *ex-parte* in the absence of one of the parties after

PAGE

Civil Procedure Code (Act XIV of 1882)
——*contd.*

first hearing, and cases decided in the absence of one of the parties at an adjourned hearing. Chapter VII of the Code relates to the appearance of parties and the consequence of their non-appearance at first hearings, whereas Chapter XIII, of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment after the first hearing. Where, therefore, a defendant put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date case was heard in his absence and a decree given against him, *held*, that such a decree was not one made *ex-parte* so as to enable the defendant to obtain the benefit of s. 108 of the Code, but that his only remedy was under s. 37 of Act XV of 1882. SITAL HARI BANERJEE *v.* HEERA LAL CHATTERJEE 269

s. 111. *See* SET-OFF 419

s. 157. *See* CIVIL PROCEDURE CODE, s. 108 269

s. 206. *See* DECREE 259

s. 206. *See* LIMITATION ACT, 1877, ART. 179 542

s. 222. *See* COSTS 904

s. 223. *See* EXECUTION OF DECREE ... 639

ss. 223—343. (Chap. XIX.) *See* SALE BY RECEIVER 479

s. 235—*Order absolute for sale, Application for—Execution of decree—Verification of application—Limitation—Transfer of Property Act (IV of 1882), section 89.*] An application for an order absolute for sale of mortgaged property under the provisions of section 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree and need not therefore be in the form prescribed by section 235 of the Code of Civil Procedure. A decree was passed in a mortgage suit on the 13th July 1887, by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295—1304 (1888—1897) in the month of Falgoon (February) each year, and that on default of three successive instalments the whole amount was to become at once due and payable. The mort-

PAGE

Civil Procedure Code (Act XIV of 1882) —*contd.*

gagor having defaulted in payment of the instalments due in the years 1297, 1298, and 1299 (1880, 1891, 1892) the mortgagee on the 18th February 1893 presented an application to the Court under section 89 of the Transfer of Property Act for an order absolute for sale. That application was not verified by the mortgagee, and the mortgagor objected that, not being so verified as required by section 235 of the Code, it could not be granted. On the 9th May 1893 the mortgagee applied for and obtained leave to verify the application which he did on that day. It was urged on behalf of the mortgagor that the application must be treated as made on the 9th May, and therefore not within three years of the date on which the 1297 instalment became due (7th March 1890), and that it was therefore barred by limitation. *Held*, that the application did not require to be in the form provided by section 235, and consequently the non-verification did not affect it, and that it was not barred by limitation. AJUDHIA PERSHAD *v.* BALDEO SINGH... 818

s. 244. *See* MESNE PROFITS 989

s. 244. *See* SALE IN EXECUTION OF DECREE 605

s. 244. *See* SECOND APPEAL ... 789

s. 244—*Separate suit—Uncertified adjustment—Agreement not to execute decree—Suit by judgment-debtor to stay execution—Civil Procedure Code (Act XIV of 1882), s. 258.*] The defendant in January 1887 obtained a decree against the plaintiff, which he partially executed, and thereupon an adjustment of account took place between the plaintiff and defendant, in which a certain sum was found due by the plaintiff to the defendant, for which sum the plaintiff gave a bond to the defendant in consideration of which the defendant agreed to exonerate the plaintiff from liability for the balance due under the decree. This satisfaction of the decree was not certified to the Court. On 12th March 1890 the defendant applied for further execution of the decree. In a suit for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it, it was contended that the suit was barred by section 244 of the Civil Procedure Code. *Held* by PIGOT and MACPHERSON, JJ. (BANERJEE, J., dissenting) that section 244 is not limited by section 258, and that the suit was not maintainable. Where a decree is satisfied by an agreement out of Court, and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement. *Per* PIGOT, J.—Section 244 of the Civil Procedure Code does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing that decree. *Per* BANERJEE, J.—A suit on the agreement was maintainable. Section 258 of the Civil Procedure Code having enacted that an uncertified adjustment cannot be recognized as an adjustment of the decree by any Court executing the decree implies that it may be recognized as such by a Court trying the matter as a regular suit. AZIZAN *v.* MATUK LAL SAHU ... 437

s. 248. *See* EXECUTION OF DECREE ... 19

s. 258. *See* CIVIL PROCEDURE CODE, s. 244 437

s. 258. *See* LIMITATION ACT, 1887, ART. 179 542

s. 260. *See* EXECUTION OF DECREE ... 784

s. 272. *See* ATTACHMENT 85

s. 274. *See* SALE IN EXECUTION OF DECREE 66

ss. 285, 295. *See* SALE IN EXECUTION OF DECREE 200

ss. 287, 289, 290. *See* SALE IN EXECUTION OF DECREE 66

s. 294. *See* SECOND APPEAL ... 789

s. 295—*Sale in execution of decree—Distribution of sale proceeds—Realization of proceeds of sale—Sale under agreement sanctioned by Court—Sale not of the right or interest of judgment-debtor in property.*] *P*, the plaintiff in a suit No. 369 of 1886, obtained a decree for Rs. 2,14,728, in execution of which certain immoveable property was attached, including

PAGE

Civil Procedure Code (Act XIV of 1882) —*contd.*

the premises 22, Strand Road, which was subject to certain trusts created by a deed, dated 2nd February 1858, executed by the father of the judgment-debtors, who with one *M.* were trustees of the deed. At the time of the attachment a suit No. 448 of 1883 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they were absolutely entitled to the premises 22, Strand Road, and the other properties; in that suit on 26th March 1888 a decree was made declaring the valid trusts, and charging the premises 22, Strand Road, with the payment of certain specific sums. In 1891, the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22, Strand Road, sold free d from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase money, and to have the balance divided between the judgment-debtors; and by the decree in that suit, dated 2nd September 1892, the trustees of the deed were authorised to sell the premises 22, Strand Road, and were directed out of the proceeds of sale to set aside Rs. 45,000 to provide for the trusts next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority the trustees on 25th February 1893 entered into an agreement with one *J. L.* for sale to him of the premises 22, Strand Road, for Rs. 1,43,000. On 8th August 1893 a notice was issued at the instance of *P.*, calling on the judgment debtors to show cause why the premises 22, Strand Road, should not be sold in execution under her attachment. On 29th August 1894 the trustees of the deed of 2nd February 1858 gave notice to *P.* of an application to be made in the suits Nos. 369 of 1886 and 441 of 1891 for the removal of her attachment or in the alternative for an order that the agreement for sale entered into by the trustees with *J. L.* be carried out; that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of *P.*; that the balance be paid to the credit of suit No. 369, "as subject to the said attachment," and that the premises 22, Strand Road, be thereupon released from attachment. These applications were heard together, and on the 14th September 1893 a consent order was made, by which it was ordered that the trustees be at liberty to carry out the agreement for sale with *J. L.*; that the sale proceeds be paid to

PAGE

Civil Procedure Code (Act XIV of 1882) —*contd.*

W., a member of the firm of the attorneys for *P.*, who out of such proceeds was to pay Rs. 45,000 to the trustees, and make other payments directed by the order and pay the balance into Court to the credit of suits Nos 369 of 1886 and 441 of 1891, "the said *P.* retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase money was paid to *W.*, who after making the payments directed paid the balance into Court. Whilst in the hands of *W.* the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments: *Held*, on an application by *P.* to have the money paid out to her in part satisfaction of her decree, that it could not be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of section 295 of the Code of Civil Procedure. The sale of the property under the order of 14th September 1893 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them. To constitute a "realization" within the meaning of section 295 there must be either a realisation by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to *P.* in respect of her lien the amount of such excess might perhaps have been treated as a "realization in execution" within the meaning of section 295, but the balance in *W's* hands was less than the amount due to *P.*, and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate. *Parshotam Dass* v. *Mahanant Surajbharthi*, I. L. R., 6 Bom., 588, and *Sewbux Bagla* v. *Shib Chunder Sen*, I. L. R., 13 Calc., 225, referred to and approved. PROSONNOMOYI DASSI *v.* SREENAUTH ROY 809

s. 310A—*Act V of 1894, section 2—Construction of Statute—Act creating new rights, Effect of—Sale in Execution of*

PAGE

Civil Procedure Code (Act XIV of 1882) —*contd.*

Decree held after Act V of 1894 came into operation, the execution proceedings being commenced before—Retrospective enactment when applicable to 'pending' proceedings.] On the 30th January 1894 application was made for execution of a decree passed on the 5th of the same month and certain property was thereafter duly attached. On the 8th February 1894 the sale proclamation was published, and on the 26th March the sale was held. On the 17th April 1894 the judgment-debtor applied to the Court under the provisions of section 310A of the Code of Civil Procedure (which section was added to the Code by Act V of 1894, and which came into operation on the 2nd March 1894) to have the sale set aside on payment to the auction-purchaser of 5 per cent on the purchase money and to the decree-holder of the amount mentioned in the sale proclamation. The auction-purchaser resisted the application on the ground that the section could not affect the sale in question. *Held* (PETHERAM, C.J., and O'KINEALY, J., dissenting) that the section conferred a new and substantive right on the judgment-debtor and was not merely a matter of procedure; and that as Act V of 1894 does not clearly indicate the intention of the Legislature that it was meant to have retrospective effect, the section had no application to pending proceedings, and the judgment-debtor was not entitled to have the sale set aside under its provisions. *Held, per* PETHERAM, C.J., and O'KINEALY, J., that the section merely deals with a matter of procedure and applied to the sale which the judgment-debtor was entitled to have set aside. *Per* PETHERAM, C.J.—All that section 310A does so far as the decree-holder and judgment-debtor are concerned, is to extend the period during which the latter may discharge his liability by 30 days beyond the date of the sale, and is merely a modification of the way in which the successful litigant may obtain the fruits of his decree; and even if it be considered as creating a new and substantive right in the judgment-debtor the words used by the Legislature in Act V of 1894 must be taken to have been used with the express intention that the section should have a retrospective effect in the sense that it should take effect on sales held after the Act came into operation, though the execution proceedings, of which the sale was a part had been commenced before the Act came into operation. *Per* O'KINEALY, J.—Act XIV of 1882 is on the face of it an Act of procedure and nothing more, and what the

PAGE

Civil Procedure Code (Act XIV of 1882) —*contd.*

Legislature intended to do by Act V of 1894 was to amend the rules of that Code with regard to the sale and delivery of property, and the section, both in form and substance, is merely a rule of procedure under which no party has a vested interest. In addition, as under section 316 of the Code, a purchaser has no vested interest in the property before the date of the certificate, he could not insist on the sale being confirmed and a certificate being given him if the amount due by the judgment-debtor be paid in before that date, *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy*, I. L. R., 14 Calc., 636; *Tupur Singh* v. *Ram Sarun Koeri*, I. L. R., 15 Calc., 376; *Uzir Ali* v. *Ram Komal Shaha* I. L. R., 15 Calc., 383; and *Deb Narain Dutt* v. *Norendra Krishna*, I. L. R., 16 Calc., 267, referred to GIRISH CHUNDRA BASU v. APURBA KRISHNA DAS ... 940

s. 311. *See* SALE IN EXECUTION OF DECREE 66

s. 317. *See* BENAMI PURCHASE ... 519

s. 373. *See* WITHDRAWAL OF SUIT 265 428, 514

s 380. *See* SECURITY FOR COSTS 177, 832

s. 435. *See* PLAINT 60

ss. 520, 521, 525, 526. *See* ARBITRATION 213

s. 549. *See* SECURITY FOR COSTS ... 526

s. 568. *See* APPEAL TO PRIVY COUNCIL... 484

s. 583. *See* EXECUTION OF DECREE ... 340

s. 583. *See* MESNE PROFITS... ... 989

s. 584. *See* SECOND APPEAL 504

ss. 586, 646B. *See* SECOND APPEAL ... 249

s. 588. *See* SECOND APPEAL ... 769, 799

s. 596. *See* APPEAL TO PRIVY COUNCIL 484, 523

s. 600. *See* APPEAL TO PRIVY COUNCIL 523

PAGE

Civil Procedure Code (Act XIV of 1882) —*contd.*

s. 608. *See* LETTERS-PATENT, HIGH COURT, CL. 15 473

s. 622. *See* APPEAL 539

s. 622. *See* SECOND APPEAL 776, 799

s. 647. *See* SALE BY RECEIVER ... 479

Civil Procedure Code Amendment Act (V of 1894), s. 2. *See* CIVIL PROCEDURE CODE, S. 310A 940

Co-accused, Right of, to cross examine witness called by another accused. *See* WITNESS 401

Collector, Exemption from sale of land under attachment by. *See* SALE FOR ARREARS OF REVENUE 70

Common Object. *See* CHARGE TO JURY ... 955

——— **Effect on Judgment of not stating in charge.** *See* CRIMINAL PROCEDURE CODE, S. 439 827

Compensation—*Criminal Procedure Code (Act X of 1882), section 560—Imprisonment in default of payment of compensation—Distress.*] The operation of section 560 of the Code of Criminal Procedure is restricted to cases instituted by "complaint" as defined in the Code or upon information given *to* a police officer or a Magistrate, and consequently that section has no application to a case instituted on a police report or on information given *by* a police officer. *Quere*—Whether under the section a Magistrate has power to make an order for imprisonment in default of payment of the compensation awarded? A police constable arrested a carter and charged him before a Magistrate with an offence under section 34 of Act V of 1861. The Magistrate acquitted the accused and directed, under section 560 of the Code, that the police constable should pay him Rs. 20 as compensation, or undergo simple imprisonment for a fortnight. *Held*, that as the section had no application to the case, the order was illegal, being made without jurisdiction. *Held*, further, that even if the Magistrate had power under the Code to pass an order for imprisonment in default of payment of compensation awarded under section 560, it was illegal to pass such an order until some attempt had been made to levy the amount in the manner provided by section 386 for the levying of a fine. RAMJEEVAN KOORMI v. DURGACHURN SADHU KHAN 979

PAGE

Competent Court. *See* RES JUDICATA ... 430

Complainant, Statement as, while in Custody of Police. *See* EVIDENCE ... 392

Complexity of Case. *See* TRANSFER OF CRIMINAL CASE 920

Compounding offence—*Requisites for composition of offence valid in law—Criminal Procedure Code (Act X of 1882), s. 345—Onus of proof—Wrongful restraint and confinement of coolies employed on tea garden.*] Where an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it, the *onus* is on him to show that there was a composition valid in law. *M*, a European British subject, charged with the compoundable offences of wrongful restraint and wrongful confinement of coolies employed on a tea garden of which he was the manager, pleaded that the Magistrate had no jurisdiction to try the cases, as they had been compounded by the complainants. The alleged compromise consisted in a Bengali paper, signed by the coolies, stating that they "made *razinama*" (compromise) "of the case of their own accord," and a paper in English signed by *M*, these papers being given to the District Superintendent of Police, who had investigated the complaints, and who stated that he asked the coolies as to the contents of the Bengali paper, and they said that they had signed it voluntarily and stated its purport, and that one of them said in the presence of the others that it was a *razinama*. *G* one of the coolies, also wrote on the paper the words in Uriya "I will not carry on the case." The Bengali paper was written by the darogah of the police station in presence of *M*. The paper signed by *M* was as follows:—"I hereby agree with these Ganjam people that there shall be no legal proceedings of any kind taken against them with the exception of those who have not completed their agreements. Those whose agreements have not been completed, proceedings will be taken against them on 22nd *May*, if they have not returned to the garden before then." Neither of the papers were explained to *G* so as to make them intelligible to him, for though the Bengali paper was read out, *G* did not understand that language. *G* was one of the coolies who had completed his agreement with *M*. *Held per* PRINSEP J.—The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification to act as an inducement for his desiring to abstain

PAGE

—Compounding offence—*continued.*

from a prosecution; here there was no forbearance on the part of *M* to proceed against *G*, who had served out the term of his engagement, and, therefore, there was no consideration for the agreement to compound. Having regard, moreover, to the ignorance and inferior intelligence of *G*, it was of vital importance for *M* to show what led to the alleged agreement, and how it was that the dangah was instrumental to it, which he had not done. *Per* TREVELYAN, J.—Compounding an offence supposes an arrangement by which the parties have settled their differences, and in the more usual acceptation of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue; and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. Having regard to the fact that the writer of the Bengali agreement had not been called, and that the contracting parties were, on the one side ignorant coolies, strangers to the land and to the language in which the document was written, and on the other, a European of some education, assisted by his Bengali clerk, and having also the assistance of the police it was not proved that *G* knew what he was about and was fairly contracting. *Held*, therefore, by the Court that there was under the circumstances no compounding of the offences with which *M* was charged, valid in law such as to deprive the Magistrate of jurisdiction to try them. MURRAY *v.* THE QUEEN-EMPRESS ... 103

Compromise. Sale on basis of decree on. *See* SALE FOR ARREARS OF RENT ... 383

Conditions of Sale. *See* PRACTICE ... 566

Consent of Parties. *See* ARBITRATION ... 590

Constructive Notice. *See* PARTIES ... 116

Contract—*Delivery order for goods deliverable monthly—Sub contract—Tender—Repudiation of contract.*] The defendant entered into a contract with the Union Mills for the purchase of "90 000 gunny bags at Rs. 21-8 per 100 bags, delivery from October to March, each month 15,000 bags." Subsequently the defendant contracted to sell to the plaintiffs these 90,000 bags "at Rs. 24-2 per 100 bags, delivery from October to March, 15,000 each month, buyers to pay difference cash against delivery order on mills." In August the defendant made out in the plaintiffs' favour a delivery order directing the mills to deliver 90,000 bags on receiving payment for the same at Rs. 21-8 per 100 bags, and on the same day sent to the plaintiffs a bill showing the amount of difference payable to him by them. The plaintiffs refused the delivery order on the ground that it had not been accepted by the mills; but on a subsequent tender of the order and bill, they offered, on the 5th September, to pay the amount of difference on receiving a delivery order accepted by the mills. The defendant treated the contract as at an end and sold the bags in the market. In a suit for damages, *held*, that the defendant sold not only a delivery order, but the right to obtain from the mills 90 000 bags deliverable in lots of 15 000 per month after payment of the difference; and impliclly undertook that the mills would accept the delivery order and deliver the goods in terms thereof when presented; that the plaintiffs were entitled to get the delivery order at any reasonable time before the first monthly instalment fell due; and, further, that the defendant was not entitled to repudiate the contract after the plaintiffs' offer of the 5th September, and having done so was liable in damages RAMDEO *v.* CASSIM MAMOOJEE 173

Contract of Service. Breach of. *See* CRIMINAL BREACH OF CONTRACT 262

Contract Act (IX of 1872), s. 68. *See* MINOR 872

Contribution. Right to for expenses of suit. *See* PRE-EMPTION... 496

Coolies on tea garden. Wrongful restraint and confinement of. *See* COMPOUNDING OFFENCE 103

Corporation or Company, Principal office of. *See* PLAINT 60

Co-sharer Landlords. Purchase of by one of several. *See* BENGAL TENANCY ACT, s. 22 869

Co-sharers. *See* PRE-EMPTION ... 496

Costs. *See* APPEAL TO PRIVY COUNCIL ... 484

——*See* BENGAL TENANCY ACT, s. 61 ... 680

——*See* HINDU LAW, WILL 683

——*See* LETTERS-PATENT, HIGH COURT, CL. 15 473

——*See* PRACTICE 566

——*See* SALE BY RECEIVER 479

PAGE

Costs—*continued.*

——*See* SECURITY FOR COSTS ... 177, 83.

——*Civil Procedure Code (Act XIV of 1882), s. 222—Costs of Partition charged under that section on shares of parties in partition suit—Mortgage by one sharer of undivided shares—Liability for costs of partition of mortgage not party to partition suit—Application in suit by person not party to suit—Remedy by supplemental suit—Procedure.*] *K. S.* and *K. B.* were joint owners of certain properties. In 1886 *K. S.* mortgaged his undivided share to *S. C.* in consideration of a loan advanced by *S. C.* to him. In 1887 *K S.* brought a suit, to which *S C.* was not made a party, against *K. B* for partition, and on 27th April 1888 obtained a decree under which a commission of partition was issued. In the course of the suit both *K. S.* and *K. B.* died, *K. B.* on 2nd September 1888, and *K. S* on 30th March 1892, and by orders of Court their sons were put on the record in place of their respective fathers. The return to the commission of partition was made on 24th February 1892, and on 20th July 1893 an order was made confirming the return, and, under section 222 of the Civil Procedure Code, charging the costs of suit and of the commission of partition to the shares of the plaintiffs and defendants, respectively, in the suit. Meanwhile in July 1889 *S. C.* brought a suit on his mortgage and obtained a decree, dated 5th August 1889, for an account and sale, and in that suit a final order for sale was made on 5th January 1891, which however was only filed on 19th August 1893. Under that order the property was advertised for sale, the return to the commission of partition being set out in the abstract of title as part of the title, and the property to be sold being described as a divided moiety. In an application made both in the partition and mortgage suits, by the defendants in the partition suit, for an order for sale of a portion of their share of the property in order to pay the costs of the suit and of the partition and other debts and liabilities for which they were liable. *Held*, that the mortgagee, having had the benefit of the partition, and having accepted and approved of it as part of his title, as shewn by the proceedings for sale, was, though not a party to the partition suit, bound by the equities attaching to the mortgaged property as incidents of the partition. He was therefore liable in respect of a proportionate share of the charge for costs of the partition created by the order of Court made in that suit under section 222 of the Civil Procedure Code, and such proportionate share of those costs should be deducted in priority out of the proceeds of the sale of the mortgaged property. The defendants in the partition suit, however, not being parties to the mortgage suit, such an order could not be properly made at their instance, but they should enforce the charge for costs against the mortgagee by supplemental suit and the Court stayed the sale of the property for a reasonable time to give the parties an opportunity of moving for stay of the sale in any such suit as might be instituted. KHUTTERPAL SRITIRUTNO *v.* KHELAL KRISTO BHUTTACHARJEE. KALLY CHURN BHUTTACHARJEE *v.* DURGA CHURN BHUTTACHARJEE. SRISHDHUR COUCH *v.* KALLY CHURN BHUTTACHARJEE 904

——*Criminal Procedure Code, s. 148—Order for costs—Assessment of such costs by successor in office.*] When a Magistrate passed an order for costs under section 148, Criminal Procedure Code, but did not state what the amount was to be, *held* that his successor in office had no jurisdiction to pass an order assessing such costs. BHOJAL SONAR *v.* NIRBAN SINGH 609

——**Lien of Attorney for.** *See* ATTORNEY AND CLIENT 85

——**of Appeal.** *See* SECURITY FOR COSTS... 526

Court, Power of. *See* ARBITRATION ... 213

——*See* LETTERS OF ADMINISTRATION 164

——**after dismissal of suit.** *See* PRACTICE 561

Court to decide whether sale should be set aside or not. *See* BENGAL TENANCY ACT, s. 173 564

Courts Colonial Jurisdiction Act, 1874 (37 and 38 Vic.) C. 27. *See* JURISDICTION OF CRIMINAL COURT 782

Creditor of deceased Mahomedan. *See* MAHOMEDAN LAW, DEBTS 311

Criminal Breach of Contract—*Breach of contract of service—Act XIII of 1859, s 2—Statute 4 Geo, IV Cap. 34 s 3—Autrefois convict*] A conviction for breach of contract of service under s. 2, Act XIII of 1859 is a bar to any subsequent conviction on the same contract for a further breach for not returning to service. GRIFFIN *v.* ILZIA DOSADH 262

PAGE

Criminal Proceedings—*Irregularity—Magistrate passing sentence before finishing his judgment—Criminal Procedure Code (Act X of 1882), ss. 265, 367 and 537*] A Magistrate on a charge of noting passed sentence on the accused without delivering his judgment in open Court, the judgment (one in course of being written, during the hearing of the case) being in fact not then completed The case went on appeal to the Sessions Judge, who, dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence *Held per* PRINSEP and TREVELYAN, JJ, that the judgment of the Magistrate was not one in accordance with the law as laid down in section 366 of the Criminal Procedure Code but *held* by PRINSEP and O'KINEALY, JJ (TREVELYAN, J dissenting) that the irregularity was one contemplated by section 537 of the Code and not having occasioned any failure of justice, it did not necessitate a retrial of the case *Per* TREVELYAN, J — The case was more than one of mere "error, omission or irregularity" within the meaning of section 537 the judgment having been irregularly arrived at and pronounced, there was no "judgment" in accordance with law, and therefore no fair trial to which every accused person is entitled the case ought therefore to be retried DAMU SENAPATI *v.* BRIDHAR RAJWAR 121

Criminal Procedure Code (Act X of 1882) s 106 *See* RECOGNIZANCE TO KEEP PEACE 622

s. 145. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 29, 404

s. 147—*Dispute concerning Easement—Procedure to be observed by Magistrate when dispute exists regarding an Easement—Parties entitled to notice*] The enquiry contemplated under section 147 of the Code of Criminal Procedure is a judicial enquiry, and the opinion formed by a Magistrate must be a judicial one based on evidence legally recorded by him in the manner provided by section 356, and on due notice to the persons who respectively claim or deny the right, the subject of the dispute. Notice to servants of such persons is not equivalent to notice to them, and in such cases actual notice should be given to all the persons claiming or denying the right and interested in the subject-matter of the enquiry. Magistrates should not institute proceedings under section 147, unless they are satisfied that a real danger of the evil for the prevention of which the procedure was devised, does in fact exist Such enquiries may lead to injustice being done from defective procedure and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated enquiry and the presence of a large number of people when the remedy of binding down a few persons to keep the peace is ready to his hand. BATHOO LAL *v* DOMI LAL 727

s 148 *See* COSTS 609

ss 204, 205 *See* PARDANASHIN LADY . 588

s 210 *See* WITNESS ... 612

ss 219 226 *See* PENAL CODE, s 372 .. 97

ss. 236 303 *See* CHARGE TO JURY 955

ss. 256 257 *See* WITNESS 642

s 73 *See* PENAL CODE, s 372 ... 97

s. 288. *See* WITNESS . . 642

s 345 *See* COMPOUNDING OFFENCE .. 103

s 349 *See* RECOGNIZANCE TO KEEP PEACE 622

s 364—*Recording Statement of accused on examination before Magistrate*] Where an accused, a Manipuri, was examined before the Magistrate through an interpreter, who obtained his answers in Manipuri and they were recorded in that language, and the interpreter translated them into Bengali, and they were recorded by the Magistrate in English, and the statement in English and that in Manipuri were found to differ *Held*, that the statement recorded in Manipuri must be taken to be the record in the case Had the Manipuri statement not been made the Magistrate, by recording the statement in English, would not have strictly complied with the spirit and intention of section 364 of the Criminal Procedure Code, though the record in English might not necessarily have been inadmissible in evidence QUEEN-EMPRESS *v.* SAGAL SAMBA SAJAO . .. 640

ss 365, 367 *See* CRIMINAL PROCEEDINGS 121

PAGE

Criminal Procedure Code (Act X of 1882) —*contd.*

s. 367. *See* JUDGMENT 92

ss. 418, 423. *See* CHARGE TO JURY ... 955

s. 421. *See* JUDGMENT 92

s. 439. *See* REVISION 931

s. 439—*Revision, Practice of High Court in—Rioting—Common object, Effect on judgment of not stating in charge—Charge, Defect in—Judgment, Defect in—Penal Code (Act XLV of 1860) section 147.*] Where certain accused persons were convicted of rioting, and it appeared that the charge did not specify any common object, and that neither the judgment of the Original Court, nor that of the Sessions Judge in appeal, found what was the common object which made the assembly of which the prisoners were members of an unlawful one: *Held*, that these defects did not vitiate the proceedings, there being ample evidence on the record to prove what the common object of the assembly was and to justify the conviction for the offence of which the lower Courts had found the accused guilty. *Held*, further, that in such a case a rule to show cause why the conviction should not be quashed under the provisions of section 439 of the Code of Criminal Procedure ought not to be granted unless on the materials which are before the Court when the rule is granted, it would be prepared to make the rule absolute if no cause be shown against it. BASIRADDI *v.* QUEEN-EMPRESS ... 827

s. 537. *See* CHARGE TO JURY ... 955

s. 537. *See* CRIMINAL PROCEEDINGS ... 121

s. 537. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 404

s. 560. *See* COMPENSATION 979

Crops, Suit to establish right to. *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF 430

Cross-Examination. *See* WITNESS 401, 642

Custom. *See* MAHOMEDAN LAW, CUSTOM ... 149

Dak Cess when considered as Rent. *See* BENGAL TENANCY ACT, ss. 53, 153 .. 132

Damages, Suit for. *See* CALCUTTA MUNICIPAL CONSOLIDATION ACT, 1888, s. 2 ... 526

PAGE

Damages, Suit for value of fruit taken from garden. *See* POSSESSION ... 241

Damdupat, Rule of. *See* INTEREST ... 840

Daughter, Right of, to Maintenance after Marriage. *See* HINDU LAW, WILL ... 683

Daughter's Son. Taluk inherited by. *See* OUDH ESTATES ACT, s. 22 997

Death of Party to Criminal Proceedings. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 404

Debt. *See* SET-OFF 419

——barred by Limitation. *See* HINDU LAW, WIDOW 190

Debts. *See* MAHOMEDAN LAW, DEBTS ... 311

Declaratory Decree. *See* EXECUTION OF DECREE 784

Decree—*Amendment of Decree—Civil Procedure Code*, 1882, *s.* 206—*Limitation Act*, 1877, *art*, 187—*Suit for mesne profits while plaintiff is out of possession.*] There is no limitation for an application under s. 206 of the Civil Procedure Code to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment. *A* instituted a suit for declaration of title and for possession. The decree, which was finally confirmed by the High Court, gave her the declaration sought for, but it contained no direction as to the possession, although the judgment stated that she was entitled to possession. *A's* son (having been substituted in her place) applied to have the decree amended. The lower Appellate Court held that the application was barred by limitation. The High Court on appeal upheld the lower Court's order, not on the ground of limitation, but on the ground that the application to amend the decree had been made in the wrong Court. *A's* son then instituted a fresh suit against the same parties for declaration of title, perpetual injunction and for mesne profits. *Held*, that the plaintiff was entitled to have the decree amended under s 206, Civil Procedure Code, and that, though the plaintiff's claim to possession was barred, yet his right was not extinguished, and he having therefore a subsisting title, was entitled, though out of possession, to maintain the suit so far as it sought to recover mesne profits. KALU *v.* LATU 259

——afterwards reversed. Payment of Revenue by person in possession of estate under. *See* VOLUNTARY PAYMENT 142

PAGE

Decree apportioning rent reserved in mokurari lease to the land transferred. *See* LANDLORD AND TENANT .. 1005

———as to amount of land. *See* RES JUDICATA 236

———containing order for ascertainment of mesne profits. *See* MUNSIF, JURISDICTION OF 550

———Ex-parte. *See* CIVIL PROCEDURE CODE, s. 108 269

———in suit for rent. *See* BENGAL TENANCY ACT, SCH. III, CL. 6 387

———not mentioning mesne profits. *See* RES JUDICATA 252

———not satisfied by sale of mortgaged property *See* TRANSFER OF PROPERTY ACT, ss. 88, 90 26

———obtained by Fraud. *See* SALE IN EXECUTION OF DECREE 605

———on Compromise, Sale on basis of. *See* SALE FOR ARREARS OF RENT ... 38

———payable by instalments. *See* LIMITATION ACT, 1877, ART. 179 542

———Reversal of, on Appeal and Restoration of Possession. *See* MESNE PROFITS 989

——— setting aside sale, Effect of not executing within six months *See* RIGHT OF SUIT 255

———Suit to set aside. *See* FRAUD ... 612

——————— *See* SALE IN EXECUTION OF DECREE 605

——— Uncertified adjustment of *See* CIVIL PROCEDURE CODE, s. 244 ... 437

Decree-holder, Application by, for rejection of petition of judgment-debtor objecting to sale and for confirmation of sale. *See* LIMITATION ACT, ART. 179 (4) ... 23

———, Purchase by without permission to bid. *See* SECOND APPEAL... 789

Deed. Decision as to genuineness of. *See* RES JUDICATA 430

Defaulting Proprietor. *See* SALE FOR ARREARS OF RENT 702

Delivery order for goods. *See* CONTRACT ... 173

Deposit of Rent in Court. *See* BENGAL TENANCY ACT, S. 61 680

Depositions in Counter-case. *See* EVIDENCE 392

PAGE

Discretion of Court. *See* PARDANASHIN LADY 588

——————*See* PROBATE ... 195

——————*See* SECURITY FOR COSTS 832

———as to amount of Dower. *See* MAHOMEDAN LAW, DOWER 135

Dismissal of daughter's claim. Effect of, on rights of reversioner. *See* LIMITATION ACT, ART. 141 8

Dismissal of Suit, Effect of. *See* PRACTICE 561

Dispute concerning Easement. *See* CRIMINAL PROCEDURE CODE, S. 147 ... 727

Distribution of Sale Proceeds. *See* CIVIL PROCEDURE CODE, S. 295 809

Distress. *See* COMPENSATION 979

Distributive share of property, Suit for. *See* LIMITATION ACT, 1877, ART. 120 ... 157

Documents explained by parol. *See* MORTGAGE 882

Dower. *See* MAHOMEDAN LAW, DOWER ... 135

———Suit for, cause of action in. *See* RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM 157

Easement, Dispute concerning. *See* CRIMINAL PROCEDURE CODE, S. 147 ... 727

Endorsement on exhibits, Application for certificate as to *See* PRACTICE ... 476

Enhancement of Rent, Application for. *See* BENGAL TENANCY ACT, S. 158 ... 807

——————Suit for. *See* BENGAL TENANCY ACT, S. 30 986

Escape from lawful custody—*Penal Code (Act XLV of 1860), s. 224.*] An offence was committed in 1866. In 1893 a person of the same name as the offender was arrested, tried, and acquitted. Whilst under arrest the accused escaped from custody. *Hold*, that he was not liable to conviction under s. 224 of the Penal Code. An escape from custody when such detention is not for an offence is not punishable under that section. GANGA CHARAN SINGH *v.* QUEEN EMPRESS 337

Evidence. *See* PRACTICE 476

———*Statement as complainant while in custody as an accused person—Depositions in counter-case—Compelling witness to answer questions—Evidence Act (I of 1872) ss. 129, 130, 131, 132.*] If a person while in custody as an accused gives

PAGE

Evidence—*continued.*

information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial. The depositions of witnesses given in a counter-case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them. *Queen* v. *Gopal Dass*, I. L. R., 3 Mad., 271, and *Queen-Empress* v. *Ganu Sonba*, I. L. R., 12 Bom. 440, followed. The mere subpœnaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132, and 148, Evidence Act, compared and discussed. MOHER SHEIKH v. QUEEN-EMPRESS 392

———as to execution of will by person near death. *See* WILL 1

———Collection of, by Magistrate on local inquiry. *See* TRANSFER OF CRIMINAL CASE 920

———in cases of disputed boundary. *See* BOUNDARY 504

———Parol Evidence. *See* MORTGAGE ... 882

Evidence Act (I of 1872) ss. 129—132. *See* EVIDENCE 392

———s. 137. *See* WITNESS 401

———s. 148. *See* EVIDENCE 392

Examination of Accused. *See* CRIMINAL PROCEDURE CODE, s. 364 642

Execution of Decree. *See* BENGAL TENANCY ACT, SCH. III, CL. 6 387

——— *See* CIVIL PROCEDURE CODE, s. 235 818

———*Execution pending appeal of decree set aside on appeal—Restitution of rights by motion where the Appellate decree does not mention restitution—Civil Procedure Code (Act XIV of 1882) s. 583.*] Where a decree made by a Court of first instance is executed pending an appeal, and on appeal such decree is set aside, the appellant is entitled by motion to obtain restitution, even though the decree of the Court of Appeal is silent as to such restitution. *A*, the owner of a 15 annas odd pie share of certain indigo land, brought a suit for partition against his co-sharer *B*, the owner of the rest of the land, and obtained a decree, from which *B* appealed. *A* without waiting for the disposal of the appeal, executed his decree and obtained possession of his share, settling it with tenants. The decree was subsequently set aside on *B's* appeal, but no order as to restitution was made in it: *Held*, on motion by *B*, that he was entitled to be put into the same position as before the partition was made (*i.e.* joint possession with *A*) and to remove any tenants who refused to vacate. ROHNI SINGH v. HODDING 340

———*Execution under section 260, Civil Procedure Code (Act XIV of 1882)—Refusal of execution where opportunity to obey the decree had not been afforded by the decree holders—Effect of such refusal—Subsequent order for execution—Res judicata—Declaratory decree.*] An order of a Court dismissed a petition for execution under section 260 of the Civil Procedure Code because the petitioning decree-holders had not then afforded to the judgment debtor an opportunity of obeying the decree, which directed him to do specific acts. *Held* (1), that another application, made after such opportunity had been afforded to him, was not barred as having been matter of prior adjudication within section 13 of the Civil Procedure Code; (2) that the decree which also declared rights on the part of the decree-holders against him was not incapable of being executed under section 260, on the objection that it was only declaratory. KISHORE BUN MOHUNT v. DWARKANATH ADHIKARI 784

———*Notice of execution—Civil Procedure Code (Act XIV of 1882) s. 248—Effect of omission to give notice of execution—Auction-purchaser.*] Where in execution of a decree, for the execution of which a notice to the judgment debtor was necessary under s. 248 of the Civil Procedure Code, certain moveable property was attached and sold without any such notice having been given: *Held*, that the proceedings in execution were void and of no effect, and it made no difference that the auction-purchaser was a third party and not the decree-holder. *Imamunnissa Bibi* v. *Liakat Husain*, I. L. R., 3 All., 424, followed. *Ramessuri Dassee* v. *Doorgadass Chatterjee*, I. L. R., 6 Calc., 103, referred to. SAHDEA PANDEY v. GHASIRAM GYAWAL 19

PAGE

Execution of Decree—*continued.*

——————*Property outside jurisdiction of Court—Jurisdiction—Mortgage Decree—Attachment, Absence of, on sale of mortgaged property—Civil Procedure Code*, 1882, *ss* 19, 223] A Court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion of the property be situate outside the local limits of its jurisdiction. *Gopi Mohan Roy* v. *Doybaki Nundun Sen*, I. L. R., 19 Calc., 13, followed; *Prem Chand Dey*. v *Mokhoda Dabi*, I. L. R., 17 Calc., 699, distinguished. The omission to cause an attachment to be made in execution of a decree for the realization of a mortgage debt does not affect the validity of a sale of the mortgaged property in execution of such decree. TINCOURI DEBYA *v* SHIB CHANDRA PAL CHOWDHURY 639

——————**Application for.** *See* LIMITATION ACT, 1877, ART. 179 542

——————**Operation of new enactment on.** *See* CIVIL PROCEDURE CODE, S. 31 A 940

——————**Pending Appeal.** *See* MESNE PROFITS 989

——————**Transfer of.** *See* SALE IN EXECUTION OF DECREE 200

Execution of Will Proof of. *See* WILL ... 279

Execution creditor, Suit by, for declaration that property is liable to be sold in execution of decree. *See* BENAMI PURCHASE 519

Execution proceedings struck off. *See* BENGAL TENANCY ACT, SCH. III, CL. 6 ... 387

Executor. *See* PROBATE 195

Exhibits marked for identification afterwards endorsed as "admitted on both sides." *See* PRACTICE 476

Ex-parte decree. *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), S, 108 269

Facts, Powers of High Court to go into Case on *See* REVISION 931

"Final Decree" *See* BENGAL TENANCY ACT, SCH. III, CL. 6 387

Fine, Power of Religious Fraternity to impose. *See* JURISDICTION OF CIVIL COURT. 463

PAGE

Finding of Facts not concurrent, but in effect the same. *See* APPEAL TO PRIVY COUNCIL 523

Fraud—*Suit in Recorder's Court to set aside for fraud decree obtained in Small Cause Court—Perjury.*] A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story. Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. But it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other side (which is fraud of the worst description) that he can obtain a rehearing of the questions in dispute in a fresh suit, by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favor it was given. In this case a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Court of Small Causes at Rangoon on the ground that it had been obtained by fraud was held under the circumstances of the case to be not maintainable. MAHOMED GOLAB *v.* MAHOMED SULLIMAN 612

Fraud, as ground for setting aside decree and sale. *See* SALE IN EXECUTION OF DECREE 605

Fresh suit, Institution of. *See* WITHDRAWAL OF SUIT 265

Goods deliverable monthly. *See* CONTRACT 173

Goods or Commodities, Workmanship of. *See* INSOLVENT ACT, S. 60 1018

Ground for annulling Sale not taken on appeal to Commissioner. *See* SALE FOR ARREARS OF REVENUE 844

Ground for transfer of case. *See* TRANSFER OF CRIMINAL CASE 920

Guardian—*Appointment of Guardian—Infant residing out of the jurisdiction of the Court—Letters Patent, High Court, clause* 17—*Guardian and Ward's Act* (*VIII of* 1890), *ss.* 4, 7, 9—*Testa-*

PAGE

Guardian—*continued.*

mentary Guardians—Jurisdiction of High Court.] Case in which the Court refused, on a summary proceeding under clause 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the Ordinary Original Civil Jurisdiction of the Court, there being testamentary guardians in existence, and no application or suit filed to remove them. On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890. IN THE MATTER OF SRISH CHUNDER SINGH ... 206

Guardian and Ward's Act (VIII of 1890), ss. 4, 7, 9. *See* GUARDIAN ... 206

High Court, Jurisdiction of. *See* GUARDIAN. 206

——**Power of.** *See* REVISION ... 931

——**Practice of, in Revision.** *See* CRIMINAL PROCEDURE CODE, S 439 ... 827

Hindu Daughter's Claim, Effect of dismissal of on rights of reversioner. *See* LIMITATION ACT, 1887, ART. 141 ... 8

Hindu Executor. Transfer to Administrator-General by. *See* ADMINISTRATOR GENERAL'S ACT, S. 31 732

Hindu Law, Inheritance. *See* PROBATE ... 697

——**Stridhan**—*Mithila Law—Succession.*] The husband's sister's sons are preferential heirs to the husband's paternal great-grandfather's great-grandsons in the succession to *stridhan* property. MOHUN PERSHAD NARAIN SINGH *v.* KISHEN KISHORE NARAIN SINGH ... 341

——**Usury.** *See* INTEREST ... 840

——**Widow**—*Alienation by Hindu widow—Legal necessity—Pilgrimage never carried out—Debt barred by limitation.*] The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property. *Chimnaji Gobind Godbole* v. *Dinkar Dhondeo Godbole*, I. L. R., 11 Bom., 320, and *Tarini Prasad Chatterjee v. Bhola Nath Mookerjee*, I. L. R., 21 Calc., 190, note, followed. In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity, the alienee is sufficiently protected if he satisfies himself by *bonâ fide* inquiries of the existence of such necessity, although he may be in fact mistaken. He has not to see to the application of the money. UDAI CHUNDER CHUCKERBUTTY *v.* ASHUTOSH DAS MOZUMDAR 190

——**Will**—*Construction of Will—Right of daughter to maintenance after her marriage—Married daughters in good circumstances—Trust for maintenance—Costs.*] A Hindu testator, after making the Administrator-General of Bengal executor and trustee of his will, and giving his daughter an annuity of Rs. 5 a month for her life, provided for the payment to *G. C. B.* whom he constituted the guardian of his daughter and of his only son during their minority, of the sum of Rs. 225 "monthly and every month for the maintenance and education of my said son and the support of my said daughter and such other persons as live in my house and are supported at my expense," and further provided that all "the residue of my estate, moveable and immoveable, with all accumulations and additions,' should be conveyed to his son on his attaining majority, "subject nevertheless to the trust of maintaining my said daughter." The daughter had married a man of means and did not need any maintenance: *Held*, in a suit by the daughter for a construction of the will and for a specific sum to be set apart for her maintenance, that the plaintiff was not entitled to anything by way of a separate allowance for maintenance; she was only entitled under the will (apart from her annuity of Rs 5 a month) to be provided for in case she were otherwise unprovided for. Where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs. The suit was therefore dismissed with costs. NARAYANI DASI *v.* ADMINISTRATOR-GENERAL OF BENGAL... 683

Hindu Widow, Alienation by. *See* HINDU LAW, WIDOW 190

Hindu Wills Act (XXI of 1870), s. 5. *See* ADMINISTRATOR GENERAL'S ACT, S. 31 ... 732

Horticultural purposes, Occupancy for. *See* BENGAL TENANCY ACT, S. 19 ... 129

Illegitimacy. *See.* MAHOMEDAN LAW, ACKNOWLEDGMENT 666

Immoral Customs. *See* MAHOMEDAN LAW, CUSTOM 149

Imprisonment in Default of Payment of Compensation. *See* COMPENSATION ... 979

PAGE

Incumbrance by defaulting tenant. Effect of Sale for arrears of Road Cess on. *See* BENGAL TENANCY ACT, S. 3... ... 722

Incumbrances created by putnidar other than defaulter. *See* SALE FOR ARREARS OF RENT 702

Indigo Planter. *See* INSOLVENT ACT, S. 60 1018

Infant residing out of jurisdiction of the Court. *See* GUARDIAN 206

Informer cognizant of offence. *See* ACCOMPLICE 328

Insolvent Act (11 & 12 Vict., c. 21), s. 5.—*Jurisdiction—Residence—Insolvency.*] There is nothing to show that the residence contemplated by section 5 of the Insolvent Act must necessarily be a permanent residence; the object of that section being to extend the benefit of the Act to those who could be said to be *bonâ fide* residents, for the time being, within the jurisdiction of the Court at the time they filed their petitions. IN THE MATTER OF DE MOMET 634

——————————s. 60—*Trader—Indigo Planter—Statute 12 and 13 Vict., c. 106 section 65—Workmanship of goods or commodities.*] An indigo planter is a "trader" within the meaning of section 60 of the Insolvent Act. IN THE MATTER OF DE MOMET ...1018

Instalments, Decree payable by. *See* LIMITATION ACT 1877, ART 179 542

Interest. *See* PRACTICE 566

——*Interest Act (XXXII of 1839)—Interest on mortgage money—Transfer of Property Act (IV of 1882), s. 88—Charge on mortgaged property—Interest where none is stipulated for after due date of mortgage*] The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage money, as it is money payable at a certain time, and under a written instrument; and the terms of section 88 of the Transfer of Property Act make such interest recoverable or payable out of the mortgaged property. The interest on the mortgage is not necessarily only the interest which the parties stipulated by the mortgage deed should be paid, but would also include interest which under the law is payable, *e.g.*, interest after the due date of the mortgage, where there is no stipulation for interest after the due date. BIKRAMJIT TEWARI v. DURGA DYAL TEWARI 274

PAGE

Interest—*continued.*

——*Rule of damdupat—Hindu law—Usury—Account directed by decree in mortgage suit between Hindus—Interest for periods before, during, and after, the six months allowed by decree for redemption.*] Where a mortgage decree, in a suit between Hindus, directed an account to be taken of what was due to the plaintiff for principal and interest, the latter to be computed at the contract rate for six months provided for redemption on payment of the amount due within the six months and directed in case of default of payment that interest due be added to the principal sum, interest thereafter to be computed on the aggregate amount at 6 per cent.: *Held* that in taking the account the rule of *damdupat* was rightly applied to the interest accruing on the mortgage debt both previous to and during the six months allowed for redemption, notwithstanding the form of the decree. (*Nobin Chunder Banerjee* v. *Romesh Chunder Ghose*, I. L. R., 14 Calc., 761, referred to); and that the same rule was applicable to the interest accruing after the period of six months had elapsed. When the rule of *damdupat* has once been applied in any account, directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time. RAM KANYE AUDIKARI v. CALLY CHURN DEY ... 840

——Compound interest. *See* MORTGAGE 366

Interest entitling person to apply for revocation of Probate. *See* PROBATE ... 697

Interest Act (XXXII of 1839). *See* INTEREST 274

Irregularity. *See* CRIMINAL PROCEEDINGS 121

——Setting aside Sale for. *See* SECOND APPEAL 799

Joint-tenancy in fee. *See* WILL ... 468

Judge hearing applications for leave to appeal to Privy Council, Power of. *See* APPEAL TO PRIVY COUNCIL 484

Judgment—*Judgment of Appellate Court—Criminal Procedure Code (Act X of 1882), ss. 367 and 421—Appeal rejected without any reasons given.*] An Appellate Court on rejecting an appeal under

PAGE

Judgment—*continued*

the provisions of section 421 of the Criminal Procedure Code need not give its reasons for the decision RASH BEHARI DAS *v.* BALGOPAL SINGH 92

———**Defect in.** *See* CRIMINAL PROCEDURE CODE, s. 439 ... 827

———**Sentence given before completion of.** *See* CRIMINAL PROCEEDINGS ... 121

Judgment-debtor, Suit by, to stay execution. *See* CIVIL PROCEDURE CODE, s. 244 ... 437

———— **Suit for declaration that property belongs to.** *See* BENAMI PURCHASE 519

Jurisdiction. *See* INSOLVENT ACT, s. 5 ... 684

———— *See* SECOND APPEAL ... 249

———— *See* SET OFF 419

———— **Infant residing out of.** *See* GUARDIAN 206

———— **Property not within.** *See* EXECUTION OF DECREE 689

Jurisdiction of Civil Court—*Civil Procedure Code, 1882, s 11—Suit for right to property and for office or emolument—Suit relating to caste questions—Right of suit by bhakats of religious fraternity expelled by other members for re admission into fraternity—Powers of fraternity to impose fine and cause expulsion until fine is paid—Cause of action*] The plaintiffs were some of the *bhakats* or members of a *satra* or religious fraternity and they claimed the right to enter the *kirtanghar* or prayer hall and perform their prayers and other rites therein. They alleged in the plaint that the management of the affairs of the *satra*, " including the distribution of honorarium and offerings and the appointment and dismissal of the *satra*," or head of the fraternity, was vested in the *samuha* or entire body of *bhakats*, and that they and their forefathers had been from generation to generation in receipt of the honorarium and offerings, and had been performing the rites and ceremonies according to the custom of the *satra* until they had been obstructed and interfered with by the defendants in such performance and had been expelled from the *kirtanghar*. The prayer of the plaint was that the plaintiffs' right to enter the *kirtanghar* to perform the said rites and ceremonies and to receive their share of the offerings might be established, that the *kirtanghar* from which they had been dispossessed might be made over to them for the purpose of

PAGE

Jurisdiction of Civil Court—*continued*

such performance, and that a prohibitory injunction might be granted enjoining the defendants not to obstruct them in such performance The defendants, who were the *satra* and the other members of the fraternity forming the majority of the entire body of *bhakats* denied the rights claimed by the plaintiffs as *bhakats*, and stated that the *satra* was governed by the *satra* and a select body of *bhakats*, that the plaintiff No. 1 had received *mantra* or spiritual initiation from one Saruram, contrary to the rules of the fraternity, and had been convicted moreover of a criminal offence and a fine of Rs 100 had accordingly been imposed on him and his partizans by the governing body of the *satra*, whose orders they had disobeyed by refusing to pay the fine, and they had therefore, been excluded from entering the *kirtanghar* and the defendants contended that the Civil Court had no jurisdiction in the matter, and that the suit was, therefore, not maintainable. The lower Courts held that the Civil Court could entertain the suit, and they made decrees practically ordering the admission of the plaintiffs to the *kirtanghar* on their complying with the order imposing the fine *Held*, that having regard to the prayer for possession of the *kirtanghar*, and to the allegations made in the plaint about the position and privileges of the *bhakats* and their rights to honorarium and offerings, and to the defendants' denial of those rights and of the plaintiffs right to enter the *kirtanghar*, the suit must be regarded as one in which right to property and to an office, within the meaning of the explanation to section 11 of the Civil Procedure Code, is contested, and, therefore, notwithstanding that the honorarium and offerings were of trifling and merely nominal value, one of a civil nature and cognizable by the Civil Court *Held* also, that the rules laid down in the English cases as to expulsion from clubs or voluntary associations which people are free to join or not, and where any one who joins may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules, are not applicable with regard to caste unions or religious fraternities in India, to which people belong not of choice but of necessity, being born in their respective castes or sects, and the consequences of exclusion from which are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. In such religious castes or fraternities the protection of Courts of Justice, even though presided

PAGE

Jurisdiction of Civil Court—*continued.*

over by Judges of a different religious persuasion, against expulsion, is much more needed than in clubs or voluntary associations. Cases of expulsion from them were, therefore, cognizable by the Civil Courts, *Sudharam Patar* v. *Sudharam*, 3 B. L. R., A. C., 91; 11 W. R., 457; *Hopkinson* v. *Marquis of Exeter*, L. R., 529, 63, and *Dawkins* v. *Antrobus*, L. R. 17 Ch. D., 615, distinguished; *Gopal Gurain* v. *Gurain*, 7 W. R., 299, and *Ramkant* v. *Ram Lochan*, S. D. A., 1859, p. 535, followed. *Advocate-General of Bombay* v. *Haim Devakar*, I. L. R., 11 Bom., 185, not followed. *Held*, further, that even if the rules laid down in the English cases were applicable, they were subject to a qualification which leaves it open to a Court of Justice to interfere with the decision of a private association on grounds, one of which is that the decision is contrary to natural justice. The decision of the lower Courts therefore ordering the re-admission of the plaintiffs to the *kirtanghar*, on their complying with the order imposing the fine, was not such an interference with the decision of the domestic tribunal of the parties as is opposed to the cases cited as to clubs, &c., as it would have been contrary to natural justice for the fraternity to enforce such exclusion after the reason for it had ceased, and make the disqualification of the plaintiffs permanent. *Held*, on the statements in the plaint, that the plaintiffs had a cause of action, and the suit could not have been properly dismissed on the finding of fact by the lower Appellate Court that the plaintiffs' exclusion from the *kirtanghar* was justified by their refusal to pay the fine imposed on them. JAGANNATH CHURN *v.* AKALI DASSIA ... 463

Jurisdiction of Criminal Court—*Offences committed on the High Seas—Trial of British Seaman for offence committed on a British Ship on the High Seas—Procedure at such trial—Merchant Shipping Act*, 1854 (17 *and* 18 *Vic., c.* 104), *sec.* 267—*Merchant Shipping Act*, 1855 (18 *and* 19 *Vic., c.* 91), *sec.* 21—*Courts (Colonial) Jurisdiction Act*, 1874 (37 *and* 38 *Vic., c.* 27.)] The trial of a British seaman for an offence committed on a British ship on the High Seas must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law. QUEEN-EMPRESS ON THE PROSECUTION OF THOMSON *v.* GUNNING 782

Kanchans, Succession to property among. *See* MAHOMEDAN LAW, CUSTOM ... 149

PAGE

Lakhiraj titles, Decision as to validity of. *See* BENGAL TENANCY ACT, ss. 101, 102 ... 38

Landlord and Tenant—*Apportionment of rent—Decree apportioning rent reserved in a mokurari lease, to the land transferred—Lessee getting possession of less land than stated in lease—Right of lessee to abatement of rent.*] A decree had determined that lands, leased in *mokurari* to a lessee, with a fixed rent thereon, were less in extent than they were specified to be in the *pottas* that comprised them, the lessors not having title to the whole; and the lessee had obtained possession of the less estate. *Held*, that the lessee was entitled to a corresponding abatement of the rent reserved. The revenue-paying *mehal*, within which were the lands subject to the *mokurari*, such lands being shares of *mouzas* therein, was afterwards sold for arrears, under Act XI of 1859. The purchaser at that sale was sued by the *mokuraridar*, to make good her incumbrance under section 54 of the Act. The lease was maintained by the decree that followed, but only as to part of the shares specified in the *pottas*, and the lessee obtained possession of that part only. In this suit for mesne profits brought by the lessee against the purchaser's heir, who filed a cross suit against her for rent, it was held that, as the lessee had not proved that she, having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the word. But when, in her suit for possession, part only was decreed to her, and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She, therefore, had the same equity for an apportionment, as if she had been evicted. On the facts it was rightly found by the first Court that the leases were not taken with knowledge on the part of the lessee that the title was a doubtful one. IMAMBANDI BEGUM *v.* KAMLESWARI PERSHAD 1005

——————*Transfer of tenure—Bengal Tenancy Act (VIII of* 1885), *ss.* 17, 18, *and* 88—*Rights of purchaser or transferee of tenure—Right of suit.*] There is nothing in section 88 of the Bengal Tenancy Act to prevent a person who has purchased a share in a *mokurari* holding from bringing a suit for a declaration of his right to that share and for possession of the same after setting aside a sale held in execution of a decree for rent to which he was not made a party. Sections 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding, and enable the transferee to be regarded as one of

PAGE

Landlord and Tenant—*continued.*

the tenants in respect of the holding. MOHESH CHUNDER GHOSE *v.* SARODA PRASAD SINGH 483

Leave to sue. *See* PARTIES 180

Legacy, Suit for. *See* SECURITY FOR COSTS... 832

Legal Necessity. *See* HINDU LAW, WIDOW... 190

Lessee getting possession of less land than stated in lease. *See* LANDLORD AND TENANT 1005

——**Right of, to abatement of Rent.** *See* LANDLORD AND TENANT 1005

Letters of Administration—*Grant of administration without determining title to property.*] In an application for letters of administration, *held*, on the evidence that the deceased left property to which administration could be granted without finally determining the title to such property. MOHUN PERSHAD NARAIN SINGH *v* KISHEN KISHORE NARAIN SINGH ... 344

——*Probate and Administration Act (V of* 1881*), s.* 3—*Majority Act (IX of* 1875*). s.* 3—*Application by person domiciled in State of Bikanir and of age by law of that State though under 18—Disability of minority, Period of, for aliens.*] The words "any other person who has not completed his age of 18 years" in section 3 of the Probate and Administration Act (V of 1881), read with the preamble and section 3 of the Indian Majority Act, mean any other person not domiciled in British India. Section 3 of the Probate and Administration Act, therefore, fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but for any other person whether they be aliens or not. Where application was made by a person domiciled in the Native State of Bikanir, and who being more than 16 years of age had by the law of that State attained his majority, though he had not attained the age of 18, for letters of administration in respect of the estate of his father who had carried on business and left all his estate and effects in Calcutta: *Held*, that the applicant not having attained the age of 18 years, the application must be refused. IN THE GOODS OF SEWNARAIN MOHATA 911

——*Probate and Administration Act (V of* 1881*), ss.* 23, 41—*Power of Court to associate another person with applicant in grant of letters of administration.*] On an application for letters of administration to which the applicant is legally entitled under section 23 of the Probate and Administration Act, the Court has no power to order, under section 41 of the Act, that another person who has no present interest in the estate should be associated with the applicant in the grant. Section 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded and the grant made to another person. ANNOPURNA DASI *v* KALLAYANI DASI 164

Letters Patent, High Court, cl. 15—*Order refusing to stay execution of decree for costs—Civil Procedure Code (Act XIV of* 1882*), s.* 608—*Security for costs—Costs.*] An order refusing to stay execution in the exercise of the discretion given to the Court under section 608 of the Civil Procedure Code is not a decision which affects the merits of any question between the parties by determining a right or liability, and no appeal from such an order will lie under cl. 15 of the Letters Patent. MOHABIR PROSAD SINGH *v.* ADHIKARI KUNWAR 473

——**cl. 17.** *See* GUARDIAN 206

Letting to hire Girl for immoral purpose for one occasion. *See* PENAL CODE, S. 372 79

"Liability" to assessment. *See* BENGAL MUNICIPAL ACT, S. 85 319

Lien for Costs. *See* ATTORNEY AND CLIENT... 85

Life Estate. *See* WILL 488

Limitation. *See* BENGAL TENANCY ACT, SCH. III, CL. 6 387

——*See* CIVIL PROCEDURE CODE, S. 235 818

——**Debt barred by.** *See* HINDU LAW, WIDOW 190

——**to suit against minor in registered bond.** *See* MINOR 872

Limitation Act (XV of 1877), Schedule II, Article 14—*Suit to set aside an act or order of an officer of Government—"Ultra vires"—Bengal Act VI of* 1870*, ss.* 48, 64—*Chaukidari Chakran land, Settlement of.*] Under section 48 of Bengal Act VI of 1870 a Collector can only settle lands with the zemindar within whose estate the lands lie. Section 64 of that

PAGE

Limitation Act (XV of 1877)—*continued.*

Act does not empower the Commissioner to set aside an order passed by the Collector under section 48. Art. 14 of Schedule II of the Limitation Act does not apply to a case where the order is an absolute nullity. BEJOY CHAND MAHATAB BAHADUR *v.* KRISTO MOHINI DASI ... 626

——————Art. 120, and Arts. 49 and 123—*Suit by Mahomedan widow to have declared her right by local custom to life interest in estate of her husband—Suit for distributive share of property—Suit for moveable property wrongly taken.*] To a suit by a Mahomedan widow against the brother of her deceased husband to have declared her right to possess for life the estate of the latter in accordance with a proved local custom, article 120, schedule II, Limitation Act XV of 1877, was held applicable, it not being a suit for a distributive share of property within the meaning of article 123 of the same; nor a suit for specific moveables wrongly taken within the meaning of article 49; and no other article of schedule II being applicable. MAHOMED BIASAT ALI *v.* HASINBANU ... 157

——————Art. 141—*Act IX of* 1871, *Art.* 142—*Dismissal of Hindu daughter's claim as heiress of a share, as barred by time, Effect of, in regard to right of reversioner after her—Res judicata—Adverse possession.*] In a suit in which the parties were descendants of a common ancestor, who had daughters only, one of the latter having been the mother of the first defendant, who was in possession of the ancestral estate, the plaintiff, son of the last surviving daughter, claimed, on her death, possession of his share by inheritance, and also of a share acquired by him by gift from another of the defendants, a son of another daughter of the common ancestor. The defence was that a suit, brought by the plaintiff's mother in her lifetime, against the same defendant, for her share, had been dismissed by a final judgment on the ground of her claim having been barred by limitation. *Held*, that the estate, which would have devolved on the plaintiff's mother as survivor of her sisters, was similar to the inheritance of a widow, the same result following the dismissal of the daughter's suit that ensued in regard to the decree adverse to the widow in *Katama Natchiar* v. *The Raja of Shiraganga*, 9 Moo. I. A., 539, where a decree, duly obtained against the widow, bound the reversioner. The previous decree dismissing the daughter's suit as barred was binding on her son. His claim therefore failed, not only as to his share by inheritance, but, for similar reasons, as to the share acquired by him from the defendant donor. Article 141 in the schedule to Act XV of 1877, fixing the date of the female heir's decease as the starting point for limitation, did not alter the existing law as to the effect of a decree adverse to the predecessor as representing the estate, nor did it give a new starting point to the successor, nor did Art. 142 in the schedule to Act IX of 1871. HARI NATH CHATTERJEE *v.* MOTHURMOHUN GOSWAMI ... 8

——————Art. 164.

See Civil PROCEDURE CODE, s. 108 ... 269

——————Art. 178.

See DECREE 259

——————Art. 179—*Execution of decree—Decree for payment of money by instalments on specified dates—Default in payment of first instalment—Right of waiver of default—Payment not certified to Court—Civil Procedure Code (Act VIII of* 1859), *s.* 206 *(Art. XIV of* 1882), *s.* 258.] A decree dated 22nd Cheyt 1295 (18th April 1882) provided "that the defendants do pay the decretal money as per instalments given below, otherwise the plaintiffs will have the power to cancel the instalments and realise the entire amount." The first instalment was made payable on 30th Cheyt 1295 (26th April 1888), and the other six instalments on the 30th of the months of Magh and Bysack in the three following years. In an application made on 9th February 1892 for execution of the decree, the decree-holder stated that only the first instalment had been paid, and asked for execution for the amount remaining due under the decree, and the judgment-debtors denied having paid any of the instalments. *Held*, that the clause in the decree to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realise the full amount was not intended to give him the option of waiving the default if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount would become exigible; if, therefore, the first instalment had not been paid, the application for execution, not having been made within three years from the date when the whole amount became due, was barred by Article 179 of Schedule II of the Limitation Act (*Chandra Kamal Das* v. *Bissessuree Dassia*, 13 C. L. R., 243,

PAGE

Limitation Act (XV of 1877)—*continued.*

dissented from); and the case was remanded for final decision of the question whether or not payment of the first instalment had been made. *Chenibash Shaha* v. *Sridam Mandal*, I. L. R., 5 Calc., 97; *Ashmutullah Dalal* v. *Kally Churn Mitter*, I. L. R., 7 Calc., 56; *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose*, I. L. R., 9 Calc., 857; *Judistir Patro* v. *Nobin Chandra Khela* I. L. R., 13 Calc., 73; *Ram Culpo Bhuttacharji* v. *Ram Chunder Shome*, I. L. R., 14 Calc., 352; *Mon Mohun Roy* v. *Durga Churn Gooee*, I. L. R., 15 Calc., 502, and *Bir Narain Panda* v. *Darpa Narain Prodhan* I. L. R., 20 Calc., 74, referred to. *Held*, further, that although under the provisions of section 258 of the Civil Procedure Code the payment in question, if made, could not be recognised as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred. There is no material difference in this respect between section 258 of the Civil Procedure Code (Act XIV of 1882), and section 206 of the old Code (Act VIII of 1859) on which the case of *Fakir Chand Bose* v. *Madan Mohan Ghose*, 4 B. L. R., F. B., 130, was decided. HURRI PERSHAD CHOWDHRY *v.* NASIB SINGH 542

——————————**Art. 179** (4)—*Application by decree holder for rejection of petition of judgment-debtor objecting to sale, and for confirmation of sale—Step in aid of execution.*] An application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed, is an application falling within the meaning of Art. 179 (4) of Schedule II of the Limitation Act XV of 1877. An application for execution of the decree made within three years from such a former application is not barred. *Kewal Ram* v. *Khadim Husain*, I. L. R., 5 All., 576, followed. GOBIND PERSHAD *v.* RUNG LAL 23

Local investigation or inquiry. *See* TRANSFER OF CRIMINAL CASE 920

Magistrate, Duty of. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 29

——————**Examination of, as witness.** *See* TRANSFER OF CRIMINAL CASE ... 920

——————**Passing sentence before finishing his judgment.** *See* CRIMINAL PROCEEDINGS 121

PAGE

Magistrate, Power of. *See* RECOGNIZANCE TO KEEP PEACE 622

——————**Successor of, in office.** *See* COSTS 609

——————**trying case, Competency of, to be witness.** *See* TRANSFER OF CRIMINAL CASE 920

Mahomedan Law. *See* RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM 157

——————**Acknowledgment**—*Illegitimacy of birth—Insufficiency of father's acknowledgment without intention to legitimate.*] On the question of the legitimacy of a son born to a Mahomedan by a Burmese woman, the question did not arise on this appeal whether the father could have entered into a valid marriage with the mother without her having relinquished Buddhism. The Court below found against her alleged conversion to the Mahomedan religion; and also found upon the facts that no marriage of the parents as distinguished from concubinage had taken place. The latter finding was affirmed. As to the question whether the son born to them had been legitimated by the father's acknowledgment of him, it was *held*, that, under the Mahomedan law, the legitimation of a son, born out of legal wedlock, may be effected by the force of his father's acknowledgment of his being of legitimate birth; but that a mere recognition of sonship is insufficient to effect it. Acknowledgment in the sense meant by that law is required, *viz.*, of antecedent right, and not a mere recognition of paternity. *Ashruff-ood-dowla Ahmed Hossein* v. *Ayder Hossein Khan*, 11 Moo. I. A., 94, referred to and followed. ABDUL RAZAK *v.* AGA MAHOMED JAFFER BINDANIM 666

——————**Custom**—*Succession to property among Kanchans—Practices not recognizable by law as customs—Immoral customs.*] Among Mahomedan Kanchans, practices relating to their holding and inheritance of property, having an immoral tendency, were not recognizable as customs, or enforceable as law. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law. Where property left by a female Kanchani, deceased, was claimed by her legitimate kindred, it was *held* that an "adoption," so called, in conformity with those practices, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired was not

PAGE

Mahomedan Law—*continued.*

the subject of the present question, which was only concerned with the right of personal succession to it; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance. GHASITI v. UMRAO JAN. GHASITI v. JAGGU 149

——————**Debts**—*Suit by creditor of deceased Mahomedan against his heir—Administration, Suit for*] In a suit against the widow of a Mahomedan on the ground that she was in possession of his estate, and where there were other heirs of the deceased, *held*, following the principle laid down in the case of *Mutty Jan* v. *Ahmed Ally*, I. L. R., 8 Calc., 370, that the suit was properly brought against the widow, and that her liability was to be measured, not by the extent of her interest in her late husband's property, but by the amount of the assets of his estate which had come into her hands, and which she had not duly disbursed in the discharge of the liabilities to which the estate was subject at her husband's death. AMIR DULHIN *alias* MOHAMDI JAN v. BAIJ NATH SINGH *alias* BAIJU SINGH .. 311

——————**Dower**—*Law in Oudh—Discretionary power of the Courts over the amount of dower—The Oudh Laws Act (XVIII of 1876), s. 5*] In a suit by a wife for her dower the Appellate Court altered the amount decreed by the first Court, as a reasonable sum payable in lieu of an excessive one, which the husband had, on the date of the marriage, nominally entered in a *nikahnama* as the wife's dower. Both Courts acted under the Oudh Laws Act, XVIII of 1876, section 5. The Judicial Committee having examined the grounds on which each of the Courts had exercised its discretionary power, considered the reason given by the first Court to be sound and restored its decree. SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU 135

Mahomedan widow succeeding to life interest in estate of her husband. *See* RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM 157

Maintenance Right of daughter to, after marriage. *See* HINDU LAW, WILL .. 683

Majority Act (IX of 1875), s. 3. *See* LETTERS OF ADMINISTRATION 911

Manager of Company. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 915

Material irregularity. *See* SALE IN EXECUTION OF DECREE 66

PAGE

Merchant Shipping Act, 1854 (17 & 18 Vic., c. 104), s. 267. *See* JURISDICTION OF CRIMINAL COURT 782

——————**1855 (18 & 19 Vic. c. 91), s. 21.** *See* JURISDICTION OF CRIMINAL COURT 782

Merger. *See* BENGAL TENANCY ACT, S. 22 ... 869

Mesne Profits—*Execution of decree in suit for possession—Execution pending appeal—Reversal of decree on appeal and restoration of possession—Right to restitution of mesne profits—Civil Procedure Code (Act XIV of 1882), sections 244, 583—Separate suit*] *R* brought a suit against *A* for possession of certain land, and obtained a decree. *K* appealed, but pending the appeal *R* took possession of the land in execution of his decree. *K* was successful in the appeal, and was restored to possession in execution of the decree of the Appellate Court, which, however, was silent as to mesne profits. In an application by *K* for mesne profits for the period during which *R* was unlawfully in possession. *Held* that *K* was entitled to restitution of such mesne profits in the execution proceedings, and it was not necessary for him to bring a separate suit to recover them. He was entitled to such restitution, either by reason of the power conferred by section 583 of the Civil Procedure Code upon the Court which passed the decree, [*Kaliamasundram* v. *Egnavedesmara*, I. L. R. 11 Mad., 261], or by reason of the inherent right that the Court has to order the restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal. [*Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meeah*, I. L. R., 11 Calc., 484.] RAJA SINGH v. KOOLDIP SINGH 989

Mesne profits after date of suit. *See* MUNSIF, JURISDICTION OF 550

——————**Decree for ascertainment of.** *See* MUNSIF, JURISDICTION OF ... 550

——————**Suit for.** *See* DECREE ... 219

——————**Suit for possession and.** *See* RES JUDICATA 252

Minor—*Necessaries—Bond, registered, executed by minor—Registration of bond by minor—Limitation to suit against a minor on a registered bond executed by him for necessaries—Contract Act (IX of 1872), section 68—Registration Act (III of 1877), section 35.*] On the 2 th April 1886, a sum of money was advanced by *A* to a minor who executed a bond in respect

PAGE

Minor—*continued.*

thereof and duly registered the same. The money was required by the minor to provide for his defence in certain criminal proceedings then pending against him on a charge of dacoity and was used by him for that purpose. On the 18th June 1892 A instituted a suit against the minor for the amount due on the bond. It was urged on behalf of the minor, who had not attained majority at the time the suit was filed, that he was not liable to A for the amount advanced; that it was not advanced for "necessaries;" that he was not liable under the bond, and that the fact of it being registered could not help the plaintiff, and consequently, even assuming that the money was required for "necessaries" the suit was barred by limitation, being brought more than three years after the advance as made. *Held*, that the liberty of the minor being at stake the money advanced must be taken to have been borrowed for necessaries within the meaning of section 68 of the Contract Act. *Held* further, that there being nothing to show that the minor *appeared* to be such to the Registrar at the time of registration so as to enable the Registrar to refuse registration under section 35 of the Registration Act, and the concealment of the fact of the executant's minority both by himself and by the plaintiff from the Registrar not amounting to fraud so as to invalidate the registration proceedings as against the minor, the Registrar had in no way violated the law relating to the registration of documents, and the bond must be taken to have been duly registered. *Held* also, that in such a case the bond could not be ignored and treated as non-existent, being the basis of the suit, and that on its being proved to have been executed by the minor in respect of money advanced for necessaries, effect must be given to the fact of registration, and the suit was not barred by limitation, and that the plaintiff was entitled to a decree. SHAM CHARAN MAL *v.* CHOWDHRY DEBYA SINGH PAHRAJ 872

——*Suit on behalf of a person alleged to be but not in fact a minor—Procedure to be adopted when suit is instituted on behalf of an alleged minor who is not so in fact.*] When a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the Court should not dismiss the suit, as the defendant can be fully indemnified by the payment of his costs. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended, the next friend's name may be treated as mere surplusage and the suit be allowed to proceed. TAQUI JAN *v.* OBAIDULLA *alias* NANHE NAWAB ... 866

Minority, Disability of, period of, for Aliens. *See* LETTERS OF ADMINISTRATION ... 911

Misdirection. *See* CHARGE TO JURY ... 955

Mithila law. *See* HINDU LAW, STRIDHAN ... 344

Mokurari Lease, Avoidance of. *See* SALE FOR ARREARS OF RENT 702

Money paid for benefit of another. *See* VOLUNTARY PAYMENT 142

Money-decree, Sale of mortgaged property in execution of. *See* TRANSFER OF PROPERTY ACT, S. 99 34

Mortgage. *See* TRANSFER OF PROPERTY ACT, S. 135 792

——*Form of Mortgage—Sale—Construction whether lands had been sold or mortgaged—Evidence—Documents explained by parol—Waste land grants—Usufructuary mortgage.*] Waste lands, granted in 1870, were transferred by the grantee in 1871 to his creditor, since deceased, from whose representatives in 1891 he claimed redemption, alleging that the transfer had been made upon a mortgage with possession. The grantee had previously, in 1870, mortgaged the lands to this creditor to secure advances taken for part payment of the purchase money. In 1871 they arranged that the creditor should advance the entire balance, and they jointly petitioned for an entry to be made, in the register of waste land grants that the ownership had been transferred from the one to the other of them. This entry was made, and endorsements to the same effect were made on the documents of grant. On the question whether the transaction was a mortgage, or a sale as the defendants alleged it to be, general evidence was given, in addition to the documentary; and among the facts in favour of the plaintiff was that the creditor had retained uncancelled, till his death, all acknowledgments for the money advanced by him in the transaction. Although, under other circumstances, and on the documents alone, the inference might have been that there had been a sale for some undisclosed consideration, yet, on the true construction of the joint petition, and the orders made thereon, the proper conclusion was that

PAGE

Mortgage—*continued.*

the entry and endorsements were intended only as a record of the arrangement proposed by the parties, and sanctioned by the registering officer. The intention was not to have an absolute sale. The transaction was *held* to be a mortgage which the plaintiff was entitled to redeem. KADER MOIDEEN *v.* NEPEAN 882

———*Sale of mortgaged property—Relative rights of first and second mortgagees of the same property—Mortgage decree giving terms of redemption of the first by the second—Compound interest.*] There being a first and a second mortgage of the same property, a mortgage decree (that upon the first by consent) was obtained by each mortgagee respectively neither of them being a party to the decree obtained by the other. In the first mortgage it was agreed that, on default by the mortgagor, interest at 12 per cent. should be paid on the principal and interest taken together, the latter being calculated with annual rests. At a judicial sale under the decree obtained by the first mortgagee, he became the purchaser of the greater part of the property In this suit, which was brought by the first mortgagee's heir now representing him against the second mortgagee, making the mortgagors parties for a declaration of his rights, it was decided that the second mortgagee was entitled to redeem the first mortgage. But the Appellate Court, referring to the consent decree having given simple interest only, made this the basis of an inference that compound interest must now be disallowed: *Held*, that this was not the right inference; and compound interest was allowed, according to the terms of the mortgage. GANGA PERSHAD SAHU *v.* LAND MORTGAGE BANK ... 366

Mortgage by sharer of undivided share. *See* COSTS 904

———**Advance payable on demand.** *See* STAMP ACT, ARTS. 22 AND 44 ... 241

———**bond.** *See* TRANSFER OF PROPERTY ACT, S. 135 568

———**decree, Sale in execution of.** *See* PARTIES 116

———**money, Interest on.** *See* INTEREST 274

———**suit between Hindus, Account directed by decree.** *See* INTEREST ... 840

Mortgaged property, Decree not satisfied by. *See* TRANSFER OF PROPERTY ACT, SS. 88, 90 26

PAGE

Mortgaged property, Sale of. *See* EXECUTION OF DECREE 639

———**Sale of, in execution of money-decree.** *See* TRANSFER OF PROPERTY ACT, S. 99 34

Mortgagee not party to partition suit, Liability of for costs. *See* COSTS ... 904

———**Suit by.** *See* PARTIES ... 116

Mortgagor, Grant of putni by. *See* PARTIES 116

——— **Liability of** *See* TRANSFER OF PROPERTY ACT, S. 135 792

Moveable property wrongly taken. Suit for. *See* LIMITATION ACT, 1877, ART. 120 157

Municipal Commissioners, Power of. *See* BENGAL MUNICIPAL ACT, S. 85 ... 319

Munsif, Jurisdiction of—*Decree containing order for ascertainment of mesne profits from date of suit to date of recovery of possession—Effect on jurisdiction of such mesne profits added to amount of decree exceeding jurisdiction of the Munsif.*] A suit, valued at Rs. 950, was brought in the Munsif's Court to recover possession of certain lands on the ground of illegal dispossession. No mesne profits up to date of suit were claimed, but the plaint prayed that such mesne profits from date of suit to recovery of possession, as might be ascertained in execution of decree, should be awarded to the plaintiff. The Munsif gave a decree in accordance with the prayer of the plaint. The plaintiff then asked that the mesne profits might be assessed, and in his petition he roughly estimated them at Rs. 1,595, and thereupon it was held both by the Munsif, and on appeal by the District Judge, that the Munsif had no jurisdiction, as he could not give a decree for more than Rs. 1,000. *Held*, on appeal to the High Court that the Munsif had jurisdiction to ascertain the mesne profits, and to give effect to the order made in his decree in the suit, notwithstanding that the amount of such mesne profits, when added to the value of the suit, might come to a sum in excess of the pecuniary jurisdiction of his Court. RAMESWAR MAHTON *v.* DILU MAHTON... 550

Necessaries. *See* MINOR 872

Necessity. *See* HINDU LAW, WIDOW ... 190

New Trial. *See* CIVIL PROCEDURE CODE, S. 108 269

Notice. *See* PARTIES 116

PAGE.

Notice, Parties entitled to. *See* CRIMINAL PROCEDURE CODE, s. 147 ... 727

——Right to. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 915

——of execution. *See* EXECUTION OF DECREE 19

——of Sale, Publication of. *See* SALE FOR ARREARS OF REVENUE ... 354

——Service of. *See* PUBLIC DEMANDS RECOVERY ACT, s. 2 ... 350

Numerous plaintiffs, Suit by. *See* PARTIES 180

Objection, Omission to specify ground of, in revenue appeal. *See* SALE FOR ARREARS OF REVENUE 70

——to award, Effect of. *See* ARBITRATION 213

Objects and Reasons of Act. *See* ADMINISTRATOR-GENERAL'S ACT, s 31 ... 752

Occupancy for horticultural purposes. *See* BENGAL TENANCY ACT, s. 19 ... 129

Occupancy Right. *See* ACCRETION ... 233

——Transfer of and purchase by some of several co-landlords. *See* BENGAL TENANCY ACT, s. 22 869

Occupiers of holdings. *See* BENGAL MUNICIPAL ACT, s. 85 319

Offence committed on High Seas. *See* JURISDICTION OF CRIMINAL COURT ... 782

Office or Emolument, Suit for. *See* JURISDICTION OF CIVIL COURT ... 463

Officer of Government, Suit to set aside act or order of. *See* LIMITATION ACT, 1877, ART. 14 626

Omission to disclose commission of offence. *See* ACCOMPLICE 328

Onus probandi. *See* BOUNDARY ... 504

—— *See* COMPOUNDING OFFENCE 103

Order absolute for sale, Application for. *See* CIVIL PROCEDURE CODE, s. 235 818

——of Special Judge on appeal from Settlement Officer. *See* SECOND APPEAL 776

——passed in Appeal by District Judge. *See* SECOND APPEAL ... 799

PAGE

Order refusing to make party defendant to application for probate. *See* APPEAL 539

——refusing to stay execution of decree for costs. *See* LETTERS PATENT, HIGH COURT, CL. 15 ... 473

——setting aside sale in execution of decree. *See* SECOND APPEAL ... 769

——for rent. *See* APPEAL ... 825

Order ultra vires. *See* LIMITATION ACT, 1877, ART. 14 622

Oudh Estates Act (I of 1869), section 22, sub-sections 4 and 7—*Taluk inherited by a daughter's son—Reviver of an appeal which had abated.*] The *taluk* to which the succession was in dispute was one of those entered in the first and second of the lists prepared in conformity with section 8 of the Oudh Estates Act, 1869, descending to a single heir by primogeniture. The last *talukdar* died without leaving a son, but left a widow, and by a former wife two daughters, of whom the elder had a son. The widow's claim to an estate for life, under sub-section 17 of section 22 of the above Act, was met by the defence that the daughter's son, having been treated by his maternal grandfather in all respects as his own son, was, under sub-section 4, entitled to inherit the *taluk*. The Courts below decided in his favour. *Held*, that the Courts below were right as to the treatment of the daughter's son in regard to sub section 4. *Pertab Narain Singh* v. *Subhao Kuoer*, I. L. R., 3 Calc, 626; L. R., 4 I. A., 228, did not show that sub-section 4 had been construed to require evidence on that point attaining to any special degree. Leave to revive the widow's appeal, which abated on her death before the hearing, was obtained by the younger daughter of the deceased *talukdar*, one of the defendants; she being next among those who would have a claim to inherit the *taluk* in succession should the appeal be decreed. *Held*, that the appellant by revivor must be restricted to the suit for the *taluk*, and could not advance on this appeal any claim of her own which she might have preferred in a suit to inherit property which had belonged to the deceased other than the *talukdari* estate. UMRAO BEGUM v. IRSHAD HUSAIN 999

Oudh Laws Act (XVIII of 1876), s. 5. *See* MAHOMEDAN LAW, DOWER ... 135

PAGE

Oudh Laws Act (XVIII of 1876) ss. 9, 12. *See* PRE-EMPTION 496

Outcaste and degraded woman, Succession to Property of. *See* PROBATE 697

Pardanashin Lady—*Attendance of pardanashin—Warrant case—Issue of summons—Criminal Procedure Code*, 1882, *ss.* 204, 205—*Discretion of Court.*] In a warrant case, the accused being a *pardanashin*, the Magistrate can dispense with her attendance under section 205 of the Criminal Procedure Code if he issues a summons in the first instance, and this he has a discretion to do under section 204. BASUMOTI ADHIKARINI *v.* BUDRAM KALITA 588

Parties—*Suit by mortgagee and sale in execution of mortgage decree—Grant of putni by mortgagor—Putnidar—Right of redemption—Notice—Constructive notice—Transfer of Property Act* (*IV of* 1882), *ss.* 3 *and* 85] A *mouza*, K, was mortgaged by *D* by bonds extending from 1867 to 1879; the last bond of 5th January 1879 including the amounts borrowed on the former bonds. On 7th January 1872, whilst it was so under mortgage, the same mortgagor *D* executed bonds whereby he mortgaged K to the defendants, and in suits brought on the basis of those bonds, came to an amicable settlement with the defendants by which, on 25th February 1879, he settled K in *putni* with them; the *bonus* for the *putni* going to satisfy the mortgage debt. In 1885 a suit, to which the present defendants were not made parties, was brought by the mortgagees of the bond of 5th January 1879, and, in execution of the decree in that suit, K was put up for sale and purchased by the plaintiff on 21st June 1886. In a suit brought in 1890 against the defendants to set aside the *putni* and for *khas* possession of K, it was found that the plaintiff had notice of the *putni*. *Held*, that the defendants as *putnidars* had an interest in K within the meaning of section 85 of the Transfer of Property Act, and should therefore have been made parties to the suit in 1885, and thereby given an opportunity of redeeming the mortgage on which that suit was brought. *Kokil Singh* v. *Duli Chund*, 5 C. L. R., 243, and *Kasimunnissa Bibee* v. *Nilratna Bose*, I. L. R., 8 Calc., 72, referred to. If not as *putnidars*, they were entitled as second mortgagees to have an opportunity of redeeming the prior mortgage and to be parties to that suit. Not having been parties, the plaintiff was not entitled to *khas* possession as against them. *Nanack Chand* v. *Taluckdye Koer*, I. L. R., 5 Calc., 265; 4 C. L. R., 358; *Dirgopal Lall* v. *Bolakee*, I. L. R., 5 Calc., 269, and *Radha Pershad Misser* v. *Monohar Dass*, I. L. R., 6 Calc., 317, referred to. JUGUL KISSORE LALL SING DEO *v.* KARTIC CHUNDER CHOTTOPADHYA 116

——*Suit by some of a class as representatives of class—Suit by numerous plaintiffs—Civil Procedure Code*, 1882, *s.* 30—*Leave to institute suit—Right of suit.*] Section 30 of the Civil Procedure Code does not require an "express" permission to be recorded by the Court, but if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an Appellate Court may (where an objection that no permission was given is taken on appeal) infer from such proceedings that permission was really granted. The *dictum* of Stuart, C.J., in *Hira Lal* v. *Bhairon*, I. L. R., 5 All., 602, dissented from. DHUNPUT SINGH *v.* PARESH NATH SINGH ... 180

"Parties concerned in dispute." *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 29, 404

——**entitled to Notice.** *See* CRIMINAL PROCEDURE CODE, S. 147 ... 727

——**Substitution of, in Criminal Proceeding.** *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 404

——**to Criminal Proceedings.** *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 915

Partition, Costs of, charged on shares in partition suit. *See* COSTS ... 904

Payment not certified to Court. *See* LIMITATION ACT, 1877, ART. 179 ... 542

——**of arrears before sale without obtaining exemption from sale.** *See* SALE FOR ARREARS OF REVENUE 844

——**of Revenue by person holding estate under decree afterwards reversed.** *See* VOLUNTARY PAYMENT 142

Penal Code (Act XLV of 1860), s. 147. *See* CRIMINAL PROCEDURE CODE, S. 439. 827

——**s. 224.** *See* ESCAPE FROM LAWFUL CUSTODY ... 337

PAGE

Penal Code (Act XLV of 1860) —*contd.*

s. 372—*Letting to hire a girl under sixteen for immoral purpose for one occasion—Prostitution for a course of life—Criminal Procedure Code (Act X of 1882), ss. 229, 226, 273.*] A young prostitute under 16 years of age was brought to a house of assignation by the accused at the request of the complainant and for his supposed use on that one occasion, it not being contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by him for that course of life. *Held*, that such a letting out by the accused was not within the meaning of section 372 of the Penal Code, which on the authorities contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse. *Dowlath Bee* v. *Shaik Ali*, 5 Mad. H. C., 479, followed. QUEEN-EMPRESS *v.* SUKEE RAUR 97

s. 411.

See STOLEN PROPERTY 328

Perjury. *See* FRAUD 612

Person domiciled in Bikanir and of age by law of that State though under 18. *See* LETTERS OF ADMINISTRATION 911

Petition, Form of. *See* BENGAL TENANCY ACT, s. 158 602

Plaint—*Verification of plaint—Civil Procedure Code, 1883, ss. 51 and 435—Principal officer of a Corporation or Company—Verification of plaint by Acting Manager.*] The Manager at Lucknow of the local branch of the Delhi and London Bank was authorised by a power of attorney under the seal of the Company in London, to sue for debts due to the Bank, and to substitute any person for himself, besides doing other acts of management. A power-of-attorney, executed by him as manager, appointing the accountant of the Bank to be its attorney in Lucknow did not contain express authority to the person so empowered to sue for debts due to the bank. The accountant conducted, under this power, the chief business of the branch, and while he was so conducting it this suit was instituted against defendants, of whom some objected that he was not authorised to sign and verify the plaint. *Held*, that section 51, Civil Procedure Code, regulating proceedings by or on behalf of ordinary plaintiffs, did not apply, but that section 435 was applicable, the Acting Manager appointed as above mentioned being a principal officer of the Bank Corporation within the meaning of that section. DELHI AND LONDON BANK *v.* OLDHAM ... 60

Possession—*Proof of possession—Title, Proof of—Suit for damages for value of fruit taken from garden—Right of suit.*] A suit for damages for the value of fruit crops taken away by the defendant from a garden alleged to be in the plaintiff's possession can be sustained on the finding that the plaintiff was in possession up to the date of the institution of the suit: it is not necessary for him to prove his title to the land, unless the defendant shows a better title. In this case there being no sufficient findings of the plaintiffs' possession to the date of suit, nor that the defendant had failed to show the better title, the suit was remanded for such findings. LEP SINGH KHASIA *v.* NIMAR KHASIA 244

Possession, Obstruction of. *See* SALE BY RECEIVER 479

Possession, Order of Criminal Court as to—*Criminal Procedure Code (Act X of 1882), s. 145—"Parties concerned in dispute"—Death of one of original parties—Substitution of party without fresh proceeding under s 145—Possession at time of institution of proceeding or at time of final order—Criminal Procedure Code, s. 537.*] In a proceeding under s. 145 of the Code of Criminal Procedure recorded on 27th April 1893, *A.* and *B* were respectively made first and second parties, and were ordered to put in statements of their claims to the land in dispute, which they accordingly did *B* died on 24th May 1893. In his statement filed on the 31st May, *A.* disclaimed any interest in the land, but stated that his mother, *D. K* (who had been a party concerned in the dispute which led to the original proceeding), was the owner and in possession of it. On 1st June *B. S.* applied to be substituted as a party in place of his father *B. D. K.* and *B S.* were made parties without any fresh proceeding under s. 145 of the Code. The case was heard on 27th June and 7th July, and on 17th July the Magistrate found as regards the possession in favour of *D. K.* *Held* by PETHERAM, C.J., and TREVELYAN, J,

PAGE

Possession, Order of Criminal Court as to—*contd.*

(RAMPINI, J., dissenting) that since the possession to be enquired into was the possession at the time of the initiation of the proceedings, the words "parties concerned in the dispute" meant parties concerned at that time: there was no power in such a proceeding to introduce parties who were not concerned in the original dispute. No order could therefore be made against *B. S.*, and the proceedings were bad as against him, *Per* RAMPINI, J.—The preliminary proceeding under s. 145 of the Code may, and in many cases must, partake of the character of a general citation to all the parties concerned in the dispute to appear, and it is not necessary for the Magistrate to confine his final order as to possession to the parties whom he may have named in the preliminary proceeding The Magistrate had power to substitute the name of *B. S.* for that of his father without commencing the proceedings *de novo*. The alteration in s. 145 of Act X of 1882, the present Criminal Procedure Code, of the language of s. 53 of the old Code, Act X of 1872, implies that the Magistrate is to decide on the possession, not at the time of the initiation of the proceedings, but at the time of recording the evidence. If there was any error in the proceedings, it was one cured by s. 537 of the Code. BECHU SHEIKH *v.* DEB KUMARI DASI ... 404

Criminal Procedure Code (Act X of 1882), s. 145—"Parties concerned."—Witnesses—Issue of summons to witnesses—Magistrate, Duty of—Process to enforce attendance of witnesses.] The words "parties concerned" in section 145 of the Criminal Procedure Code do not necessarily mean only the persons who are disputing, but include also persons who are interested in, or claiming a right to, the property in dispute. Though in a proceeding under section 145, the evidence is to be recorded as in a summons case, it is the duty of the Magistrate to issue processes for the attendance of such witnesses as the parties may desire to call, unless he can show good reasons for not doing so. *Hurendro Narain Singh Chowdhry v. Bhobani Prea Baruani*, I. L. R., 11 Calc., 762, followed. RAM CHANDRA DASS *v.* MONOHUR ROY 29

Criminal Procedure Code (Act X of 1882), s. 145—Parties to proceedings—Manager of Company—Right to Notice.] Where proceedings under section 145 of the Code of Criminal Procedure were instituted by a Magistrate regarding a dispute as to the right to dig for coal in a certain *mouza* which was claimed by a Company to the exclusion of those in possession of the surface rights of a portion of the *mouza*, and the Magistrate made the manager of the Company only a party to the proceedings and not the Company itself, and an order was made under the section in favour of the manager: *Held*, that the order was bad and must be set aside, as the parties interested were not properly before the Court. The manager had no interest, except as such, or possession except as representing the Company, and such possession is not the kind of possession contemplated by the section. *Nawaz Ali v. Ram Ballabh Chakravarti*, I. L. R., 21 Calc., 916, note. BEHARY LALL TRIGUNAIT *v.* DARBY 915

Possession, Suit for, Execution of Decree in. *See* MESNE PROFITS ... 989

Possession and Mesne Profits, Suit for. *See* RES JUDICATA 252

Poverty of Appellant. *See* SECURITY FOR COSTS 526

Power of Sale in default of repayment of advance. *See* STAMP ACT, ARTS. 29 AND 44 241

Practice. *See* ATTORNEY AND CLIENT ... 85

——— *See* BENGAL TENANCY ACT, S. 158 60

———*See* SALE BY RECEIVER ... 479

———*Dismissal of suit—Staying Proceedings—Application to restrain Receiver parting with funds, pending appeal—Power of Court.*] Under the Code of Civil Procedure, once a suit has been dismissed, the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs. An application therefore made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the receiver may be restrained from parting with funds in his hands pending an appeal, cannot be granted. YAMIN-UD-DOWLA *v.* AMED ALI KHAN ... 561

———*Evidence—Exhibits marked for identification afterwards marked as "admitted on both sides" by Bench Clerk—Certificate by Court as to the endorsement on exhibits—Record of appeal to the Privy*

PAGE

Practice—*continued.*

Council.] In an application for a certificate that a limited meaning should be placed upon endorsements made by the Bench Clerk on certain exhibits printed in the paper-book in a suit, which had gone on appeal to the Privy Council, the Court, considering the reasons for the application to have arisen from the nature of the case and from the contentions on either side, left the matter to be dealt with by their Lordships of the Judicial Committee, at the same time directing its order to be forwarded to the Privy Council. RATTAN KOER *v.* CHOTAY NARAIN SINGH 476

———*Purchase-money, Payment of, into Court—Conditions of sale—Interest—Registrar's sale—Costs.*] Where the purchaser of a property at a Registrar's sale is out of time in paying into Court the balance of his purchase-money, the practice of the Original Side of the High Court is that payment of interest shall follow as a matter of course. But if there has been delay on the part of the party having the carriage of the proceedings, and if that party appears on the summons taken out by the purchaser for the purpose of paying into Court the balance of such purchase-money, he shall not be allowed his costs against the purchaser. KANYE LALL DASS *v.* SHAMA CHURN DAWN 566

Practices not recognizable by law as customs. *See* MAHOMEDAN LAW, CUSTOM 149

Pre-emption—*Pre-emption among co-sharers under the Oudh Laws Act (XVIII of 1876), ss. 9 to 13—Pre-emptor's right, as such, dependent on the intending vendor's right to sell—Accounts between co-sharers—Contribution, Right to, for expenses of suit.*] Pre-emption, as declared in the Oudh Laws Act, 1876, is not applicable where the co-sharer claiming it denies the title of the co sharer proposing to sell, alleges that the latter is not a co-sharer, and says that he himself is entitled to the property. One of two co-sharers, entitled to equal shares in an inheritance having taken possession of the whole, was sued by the other for her share, with mesne profits from the date of the suit. To provide costs, the latter had sold to her co-plaintiffs the right to claim half of her share. The defences were—(1) relinquishment of her claim in favour of the defendant; (2) that the defendant had a right of pre-emption as to part, in consequence of the above transaction; (3) that the share in dispute was subject to a proportion of the debts due from the estate of the deceased, chargeable on the whole inheritance; and that if the plaintiffs should be held to be entitled to a decree, they should also be declared liable to pay, according to shares, their part of all the debts of the deceased liquidated by the defendant, as well as a proportion of money which he had expended, in good faith, in litigation for the protection of the inheritance. As to (1), the two Courts below concurred in the finding that no relinquishment had taken place. As to (2), it was pointed out that there had been no attempt to sell a share of the inheritance, but only to sell a share in a suit; and it was *held*, that the position taken up by the defendant was inconsistent with his claiming to pre-empt, so that pre-emption was inapplicable. As to (3), it was *held*, that, although the plaintiffs could not have a decree for mesne profits during the whole period of the defendant's possession, yet, if any account was to be taken of the defendant's payments, it must also be taken of his receipts, and it was held that the incidental benefit to the plaintiffs, who had not authorized the litigation, in which expense had been incurred, did not give rise to any implied contract on their part, or render them liable in equity for any portion of that expense. ABDUL WAHID KHAN *v.* SHALUKA BIBI 496

Presidency Small Cause Court Act (XV of 1882), s. 37, *See* CIVIL PROCEDURE CODE, s. 108 269

s. 18. *See* SET-OFF 419

Presumption. *See* STOLEN PROPERTY ... 328

——— *See* WILL 379

Prevailing rate of rent, Meaning of. *See* BENGAL TENANCY ACT, s. 30 ... 986

"Principal Officer" of Corporation or Company. *See* PLAINT 60

Private Arbitration. *See* ARBITRATION... 213

Probability of unfair trial. *See* TRANSFER OF CRIMINAL CASE 920

Probate—*Application for, and grant of probate—Probate and Administration Act (V of 1881)—Discretion of Court as to refusal to grant probate—Executor.*] Where, on application for probate by a

PAGE

Probate—*continued.*

person appointed executor by the will, the genuineness of the will is not disputed, and the applicant is a person not legally incapable, the Court acting under the Probate and Administration Act (V of 1881) has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit and proper person to be appointed executor. HARA COOMAR SIRCAR *v.* DOORGAMONI DASI ... 195

———*Revocation of Probate—Interest entitling person to apply for revocation—Hindu Law—Inheritance—Succession to property of degraded and outcaste woman—Right of her husband's family in her property acquired while degraded.*] In an application for revocation of probate of the will of *K*, which had been granted to *D*, it appeared that *K* was a Hindu widow, who many years ago left her husband's family dwelling-house and became a woman of the town; that she had lived under the protection of *D* for 35 years; that when she came to *D*, she had no property, but that all the property she left had been acquired by her while in a degraded and outcaste state. *Held*, that the applicant as her husband's sister's son had no interest in her estate entitling him to maintain the application. The general rule, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste, applies with even greater force as between her and the members of her husband's family. Those members therefore have no right of inheritance in property acquired by a woman who leaves her husband's family and becomes degraded. IN THE GOODS OF KAMINEYMONEY DEWAH 697

———**Application for, refusal to add party as defendant in.** *See* APPEAL 539

Probate and Administration Act (V of 1881.) *See* ADMINISTRATOR-GENERAL'S ACT, S. 31 732

———

See PROBATE 195

———

s. 3. *See* LETTERS OF ADMINISTRATION. 911

———

ss. 28, 41. *See* LETTERS OF ADMINISTRATION 164

———

s. 50. *See* WILL 1

———

ss. 53 and 86. *See* APPEAL ... 539

PAGE

Procedure. *See* COSTS 904

———*See* CRIMINAL PROCEDURE CODE, S. 147 727

———*See* JURISDICTION OF CRIMINAL COURT 782

———*See* MINOR 866

———*See* RECOGNIZANCE TO KEEP PEACE... 622

———**when share of estate is not sold at Auction Sale.** *See* SALE FOR ARREARS OF REVENUE 844

Process to enforce attendance of witnesses. *See* POSSESSION, ORDER OF CRIMINAL COURT AS TO 29

Property outside jurisdiction of Court. *See* EXECUTION OF DECREE ... 639

Prostitution for a course of life. *See* PENAL CODE, S. 372 97

Provincial Small Cause Courts Act (IX of 1887), s. 16. *See* SECOND APPEAL 249

Public Demands Recovery Act (Bengal Act VII of 1880), s. 2—*Bengal Act VII of* 1668, *s.* 8—*Certificate of sale—Evidence of sufficiency of service of notice of sale—Construction of Act—Act XI of* 1859.] Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1880) which enacts that that "Act so far as is consistent with the tenor thereof shall be construed as one with Act XI of 1859 and Bengal Act VII of 1868," does not extend the effect of section 8 of Bengal Act VII of 1868 to a sale certificate granted under section 19 of Bengal Act VII of 1880, so as to make such a certificate conclusive evidence of the sufficiency of the service of the notices of sale under the last-named Act. PULIN CHANDRA ROY *v.* AKBAR HOSSEIN ... 350

Purchase by decree-holder without permission to bid. *See* SECOND APPEAL 789

Purchase-money, Payment of, into Court. *See* PRACTICE 566

Purchaser, Liability of, for rent. *See* SALE FOR ARREARS OF RENT 169, 883

———, **Right of, to sue for declaration of title and possession.** *See* RIGHT OF SUIT 255

———, **Rights of.** *See* LANDLORD AND TENANT 433

PAGE

Purchaser, Rights of. *See* SALE BY RECEIVER 479

———, Title of. *See* SALE FOR ARREARS OF RENT ... ...,883

Putnidar. *See* PARTIES 116

Question of Law. *See* APPEAL TO PRIVY COUNCIL 484

Rateable Distribution. *See* SALE IN EXECUTION OF DECREE 200

"Realization" of proceeds of Sale. *See* CIVIL PROCEDURE CODE, s. 295 ... 809

Reasons for rejecting Appeal. *See* JUDGMENT 92

Receiver. *See* SALE BY RECEIVER ... 479

——— Application for costs to be paid out of money in hands of. *See* ATTORNEY AND CLIENT 85

——— Application to restrain his parting with funds pending appeal. *See* PRACTICE 561

——— Attachment of money in hands of. *See* ATTACHMENT ... 85

Recognizance to keep peace—*Criminal Procedure Code*, 1882, *ss.* 106, 349—*Procedure to be followed by Magistrate trying a case when he is not empowered to bind the accused down under s.* 106 *of the Criminal Procedure Code.*] An Honorary Magistrate exercising third class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of Rs. 10, or in default to suffer seven days' rigorous imprisonment. He further submitted the case to the District Magistrate with a recommendation that the accused should be bound down to keep the peace under section 106 of the Criminal Procedure Code, and the District Magistrate ordered the accused to furnish security. *Held*, that the order of the District Magistrate was illegal and must be set aside. Before an order under section 106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a third class Magistrate, and the order must be passed by the Magistrate who convicts and passes the sentence. MAHMUDI SHEIKH *v.* AJI SHEIKH ... 622

Record of appeal to Privy Council. *See* PRACTICE 476

Record of rights. *See* BENGAL TENANCY ACT, ss. 101, 102... 378

PAGE

Record of rights, Dispute as to entries in. *See* SECOND APPEAL 776

——— Proceedings in preparation of. *See* BENGAL TENANCY ACT, ss. 101, 102 38

——— Publication of. *See* BENGAL TENANCY ACT, s. 108 ... 521

Recorder's Court, Suit in, to set aside decree of Small Cause Court ... 612

Recording Statement of accused before Magistrate. *See* CRIMINAL PROCEDURE CODE, s. 364 642

Redemption, Periods before, during and after time allowed for. *See* INTEREST 840

——— Right of. *See* PARTIES .. 116

——— Terms of decree for. *See* MORTGAGE 366

Refusal of execution where no opportunity to obey decree has been given. *See* EXECUTION OF DECREE ... 784

———to grant probate, Discretion of Court as to. *See* PROBATE ... 195

Registrar's Sale. *See* PRACTICE ... 566

Registration Act (III of 1877), s. 35, *See* MINOR 872

Regular Suit. *See* ATTORNEY AND CLIENT 85

Regulation 1819—VIII., s. 11. *See* SALE FOR ARREARS OF RENT 702

———1825—XI, s. 4, cl. 1. *See* ACCRETION 233

Religious fraternity, Suit for re-admission into. *See* JURISDICTION OF CIVIL COURT 463

Relinquishment or omission to sue for portion of claim—*Civil Procedure Code*, 1882, *s.* 43—*Mahomedan Law—Succession of a Mahomedan widow by local custom to a life interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate.*] A decree in a suit brought by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower, gave

PAGE

Relinquishment or omission to sue for portion of claim—*contd.*

no occasion for the application of section 43 of the Civil Procedure Code, having been made upon a cause of action distinct from that on which the present suit was founded. *Raja of Pittapur* v. *Venkata Mahipati Suria*, I L. R., 8 Mad., 520; L. R., 12 I. A., 119, referred to and followed. MAHOMED RIASAT ALI v. HASIN BANU 157

Rent. *See* BENGAL TENANCY ACT, s. 3 ... 722

—**Abatement of.** *See* LANDLORD AND TENANT 1005

—**Accrual of.** *See* SALE FOR ARREARS OF RENT 383

—**Amount of.** *See* BENGAL TENANCY ACT, ss. 53, 153 132

—**Apportionment of.** *See* LANDLORD AND TENANT 1005

—**Deposit of, in Court.** *See* BENGAL TENANCY ACT, s. 61 680

—**Rate of.** *See* BENGAL TENANCY ACT, s. 30 986

——— *See* RES JUDICATA ... 236

—**Right to.** *See* BENGAL TENANCY ACT, s. 22 869

—**Suit for.** *See* RES JUDICATA ... 236

——— *See* SALE FOR ARREARS OF RENT 169

Repeal of Act, Effect of. *See* BENGAL TENANCY ACT, s. 19 129

Report of Select Committee on Bill. *See* ADMINISTRATOR-GENERAL'S ACT, s. 31 732

Repudiation of contract. *See* CONTRACT 173

Requisites for valid composition of offence *See* COMPOUNDING OFFENCE... 103

Residence. *See* INSOLVENT ACT, s. 5 ... 634

Res Judicata. *See* BENGAL TENANCY ACT, ss. 101, 102 378

——— *See* EXECUTION OF DECREE.784

——— *See* LIMITATION ACT, 1877, ART. 141 8

——— *Competent Court—Decision as to genuineness of deed.*] In a suit to establish the plaintiff's right to a standing crop on the basis of his title to the land, it was held that where the plaintiff's title depended upon the genuineness of a *kobala* in respect of the land, a finding with regard to such genuineness is binding as *res judicata* in a subsequent suit between the same parties with regard to the title to the same land, although no issue was distinctly raised in the former suit on the question of genuineness. *Soorjomonee Dayee* v. *Suddanand Mohapatter*, 12 B. L. R., 304; L. R., I. A., Sup. Vol. 212, referred to. DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY 430

——— *Rent suit—Decree as to amount of land—Rent payable for former years—Rate of rent payable*] The plaintiff sued the defendant for rent of certain lands. The defendant contended that he was not liable for the entire rent, as part of the land was in the plaintiff's possession. The defendant failed to prove his contention, and a decree was given for the full amount claimed. Subsequently the plaintiff again sued the defendant in regard to the same property for arrears of rent for subsequent years at the rate claimed in the former suit. The defendant had the land measured, adduced evidence, and endeavoured to raise the same defence as he had in the previous suit. No allegation was made to the effect that the rent had been altered in consequence of anything that had happened since the previous decision. The lower Courts, without considering the evidence adduced by the defendant, held that the defendant could not again raise the same contention, as the question had already been considered and determined in the previous suit, and was *res judicata* between the parties. *Held*, that the previous decision did not operate as *res judicata*, and that the lower Courts ought to have determined on the evidence adduced what the amount of rent in question was. NIL MADHUB SARKAR v. BROJO NATH SINGHA 236

——— *Suit for possession and mesne profits—Ex-parte decree for possession without mention of mesne profits—Subsequent suit for same mesne profits and for subsequent mesne profits—Civil Procedure Code (Act XIV of 1882), s. 13*] A suit was instituted for recovery of possession and for mesne profits. An *ex-parte* decree for possession only was made, but the decree was silent as regarded the mesne profits. Subsequently a second suit was instituted for the same mesne profits as well as for mesne profits for a subsequent period. *Held*, that the claim for mesne profits prior to the institution of the first suit was

PAGE

Res Judicata—*continued.*

barred under section 13 of the Civil Procedure Code. JIBAN DAS OSWAL *v.* DURGA PERSHAD ADHIKARI ... 252

Restitution of mesne profits, Right to. *See* MESNE PROFITS 989

——— of rights by motion, where decree is set aside on appeal. *See* EXECUTION OF DECREE 340

Restricted enjoyment, Direction as to. *See* WILL 488

Retrospective operation of enactment when applicable to pending proceedings. *See* CIVIL PROCEDURE CODE, s. 310A. 940

Revenue. Payment of by person in possession of estate under decree afterwards reversed. *See* VOLUNTARY PAYMENT 142

Revenue Courts, Application of Civil Procedure Code to suits in. *See* WITHDRAWAL OF SUIT 428

Revenue Officer, Power of, to declare land claimed as Lakhiraj liable to rent. *See* BENGAL TENANCY ACT, ss. 101, 102 38

Reversioner. Effect on rights of, of dismissal of Hindu daughter's claim. *See* LIMITATION ACT, 1877, ART. 141 8

Revision—*Criminal Cases—Power of High Court in revisional cases—Power to go into case on facts—Criminal Procedure Code (Act X of 1882), s. 439.*] Under section 439 of the Code of Criminal Procedure, 1882, the High Court has power to consider the facts of a case in revision. RAM BRAHMA SIRCAR *v.* CHANDRA KANTA SHAH 931

——— Practice of High Court in. *See* CRIMINAL PROCEDURE CODE, s 439 827

Right of Occupancy. *See* ACCRETION ... 233

——— *See* BENGAL TENANCY ACT, s. 19 129

Right of Suit. *See* JURISDICTION OF CIVIL COURT 463

——— *See* LANDLORD AND TENANT 433

——— *See* PARTIES 180

——— *See* POSSESSION 211

PAGE

Right of Suit—*Decree setting aside sale, Effect of not executing, within six months—Sale, Validity of—Right of auction-purchaser to bring suit for declaration of title and possession—Revenue Sale Law (Act XI of 1859), s. 34.*] Certain property having been sold for arrears of Government revenue, the defaulting tenant brought a suit in the Civil Court to have the sale set aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held*, in a suit brought by the auction-purchaser to recover possession of the share he had bought at the sale, that such non-execution of the decree had the effect of restoring the sale so far as it concerned the defaulter, and that the plaintiff was entitled to succeed. ABDUL LOTIF *v.* YOUSUFF ALI 255

Rioting. *See* CHARGE TO JURY ... 955

——— *See* CRIMINAL PROCEDURE CODE, s. 439 827

——— *Rights of true owners against person in wrongful possession—Affray, Evidence as to nature of.*] When a party is in possession of land for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose. In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats on which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows. MOHER SHEIKH *v.* QUEEN-EMPRESS 392

Road Cess, Sale of tenure for arrears of. *See* BENGAL TENANCY ACT, s. 3 ... 722

Ryot. *See* ACCRETION 233

——— **Definition of.** *See* BENGAL TENANCY ACT, s. 19 129

Ryots, Status of, Question as to. *See* SECOND APPEAL 776

Sale. *See* MORTGAGE 882

——— **Effect on, of purchase being benami for judgment-debtor.** *See* BENGAL TENANCY ACT, s. 173 ... 554

——— **Suit to set aside.** *See* BENGAL TENANCY ACT, s. 173 554

PAGE

Sale, Suit to set aside. *See* SALE FOR ARREARS OF REVENUE ... 70, 354

Sale by Receiver—*Obstruction of possession—Purchaser, Rights of—Code of Civil Procedure (Act XIV of 1882), chapter XIX, and s 647—Practice—Costs.*] Practice of the Original Side of the Court followed in recognizing the right of a purchaser at a Receiver's sale to obtain the assistance of the Court in obtaining possession under the provisions of the Court relating to sales in a suit. MINATOONNESSA BIBEE *v.* KHATOONNESSA BIBEE 479

Sale for Arrears of Rent. *See* BENGAL TENANCY ACT, S. 173 554

———*Bengal Regulation VIII of 1819, s. 11—"Defaulting Proprietor"—"Defaulter"—Incumbrances created by previous putnidar—Mokurari lease, Avoidance of—Voidable incumbrances.*] In 1839 a *mokurari* lease was granted to the predecessors of the defendants by the then *putnidar* of a *putni* created in 1819. In 1848 the *putni* was sold for arrears of rent under the provisions of Bengal Regulation VIII of 1819, but the purchaser at that sale did not interfere with the *mokurari*. In 1885 the *putni* was again brought to sale under the same Regulation for arrears of rent, the default being made by one of the successors of the purchaser in 1848, and at this sale it was purchased by the plaintiffs. In 1890 the plaintiffs sued to set aside the *mokurari* lease, contending that they were, by virtue of their purchase, entitled to avoid all incumbrances created by any *putnidar* and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of section 11 of the Regulation restricted the plaintiffs to avoiding incumbrances, the acts of the immediate defaulter, and that, as the purchaser in 1848, and his successors in title previous to the defaulter in 1885, had not interfered with the *mokurari* lease, the plaintiffs could not have it set aside. *Held* (RAMPINI, J., dissenting) that the plaintiffs were entitled to avoid the *mokurari*. *Held, per* GHOSE and BEVERLEY, JJ., that having regard to the policy and principle of the regulation a zemindar is entitled to bring a *putni* to sale in the same condition in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors. *Per* GHOSE, J.—The *mokurari* lease was an incumbrance upon the *putni*, but inasmuch as section 11 distinguishes in clauses 1 and 2 between incumbrances and leases it might be regarded as the latter. If treated as an incumbrance it must be held to have *accrued upon* the *putni* by reason of the defaulting zemindar not having set it aside, though entitled to do so within the meaning of those words in clause 1. If treated as a lease the words in clause 2, *holder of the former tenure*, are wide enough to include any *putnidar* whether the defaulting or a previous holder. *Per* BEVERLEY, J.—The words "defaulting proprietor" used in clause 1 of section 11 must be read as the "proprietor of the tenure in default," and were not intended to be restricted to the particular proprietor for whose default the tenure is brought to sale, and the word "defaulter," used in clause 2 of that section, must be given a similarly wide interpretation. GOPENDRO CHUNDER MITTER *v.* MOKADDAM HOSSEIN 702

———*Liability of auction purchaser for arrears of rent prior to purchase—Bengal Tenancy Act (VIII of 1885), ss 65 and 169, cl. c—Rent, Suit for.*] The plaintiffs sued the first five defendants for arrears of rent due in respect of a certain tenure, and obtained a decree on the 16th of April 1888. In execution of that decree the tenure was sold on the 8th April 1891, the defendants 6, 7, and 8 being the auction-purchasers. On the 18th of April 1891 the plaintiffs sued all eight defendants for the arrears of rent which had become due between the 16th April 1888 and the 8th April 1891. *Held*, that the auction-purchasers (defendants 6 7, and 8) were not liable, the arrears of rent sued for having become due prior to their purchase. FAEZ RAHAMAN *v.* RAMSUKH BAJPAI ... 169

———*Sale on basis of decree on compromise—Auction purchaser, Title of—Liability of purchaser for rent accruing due after his purchase, but before confirmation of sale—Effect of compromise as against purchaser—Rent, Accrual of.*] A tenant, when sued for arrears of rent of a *jote*, compromised the case by executing a *solehnama* agreeing to pay rent at 13 annas per bigha on 4,300 bighas. Subsequently the *jote* was sold in execution of a decree passed on the basis of the *solehnama*, and was purchased by the defendant on the 20th March 1889, the sale being confirmed on the 7th August 1889. In a suit instituted by the landlord

PAGE

Sale for Arrears of Rent—*continued*

against the auction-purchaser for arrears of rent for the whole year 1296 (13th April 1889 to 12th April 1890), *held*, that the purchaser was liable for the whole instalment of rent accrued due after the date of his purchase, but before the confirmation of the sale, notwithstanding that his title was not perfected until the latter date. Rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or, in the absence of any contract, according to the general law laid down in section 53 of the Bengal Tenancy Act. *Held*, also, that he was liable for rent under the terms of the *solehnama* irrespective of any question as to whether the quantity of land there mentioned was correct or not. SATYENDRA NATH THAKUR *v.* NILKANTHA SINGHA. 383

Sale for Arrears of Revenue—*Act XI of 1859, ss. 6, 13, 14 and 33—Proceedings when share of estate is not sold at auction sale—Payment of arrears before sale without obtaining exemption from sale—Ground for annulling sale not declared and specified in appeal to Commissioner.*] The plaintiffs and defendants were sharers in a certain estate, the plaintiffs being owners of a joint share, and the defendants the owners of other shares in respect of which separate accounts had been opened in the Collector's register. The plaintiffs in March 1890 made default in the payment of Government revenue for their share, and it was advertised to be put up for sale on 18th September 1890, under sections 6 and 13 of Act XI of 1859, for recovery of the amount due, Rs. 18-6. On the 16th September the plaintiff paid into the treasury of the Collectorate the amount of arrears due, and made an application that the joint share might be exempted from sale; receipts were given for the amount paid in, but no order was made on the application, and the share was not exempted from sale. On the 16th September the joint share was put up for sale, but, there being no bids, the sale was postponed, and on the same day the Collector made an order under section 14 of Act XI of 1859 that, unless the arrears were paid by the other sharers (the defendants) within ten days, the whole estate would be put up for sale. Notices of this order, provided for by a rule made under the Act by the Board of Revenue, were given to the serving peon on 2nd October for service on the defendants, and the arrears were paid in by some of the defendants on the 4th and by others on the 7th October, and,

PAGE

Sale for Arrears of Revenue—*continued.*

eventually, the Collector, acting under section 14 of the Act, granted on the 5th December 1890 a certificate of purchase and gave delivery of possession to the defendants. The plaintiffs appealed to the Commissioner, but their appeal was rejected on 16th March 1891. In a suit for a declaration that the proceedings taken by the Collector under section 14 of the Act were illegal and conveyed no title to the defendants, and for possession of the joint share with mesne profits: *Held* by PETHERAM, C.J., and BEVERLEY, J. (AMEER ALI, J., dissenting) that the Collector not having exempted the share from sale, the payment by the plaintiff of the arrears on the 16th September was no bar to the proceedings taken under section 14 of the Act. *Held*, also, that the defendants' purchase was not made invalid by the fact of their not having paid in the arrears within ten days from the 18th September, the day fixed for the sale; the ten days in section 14 run from the time when notice of the Collector's order is given to the other sharers, and not from the date of the sale. *Held*, further, that it was not open to the plaintiffs to take this latter objection, as it was not declared and specified in their grounds of appeal to the Commissioner in accordance with section 33 of the Act. *Govind Lal Roy* v. *Ramjanam Misser*, I. L. R., 21 Calc., 70, followed. *Per* AMEER ALI, J., *contra*. *Per* PETHERAM, C.J.—Section 33 applies to sales under section 14 as well as to sales by public auction under the Act. *Semble.*—There is nothing in Act XI of 1859 which would have prevented the plaintiffs from purchasing the share themselves when it was put up for sale on 18th September. *Per* BEVERLEY, J.—Under section 6 of the Act, the sale, if it had taken place on the 18th September, would have conveyed a good title to the defendants; and under section 14 they are expressly declared to have "the same rights as if the share had been purchased by them at the sale." *Per* AMEER ALI, J.—The proceedings provided for by section 14 do not apply in a case where there have been no bids at the sale. Section 33 is not applicable to a transfer by the Collector of the defaulting share under section 14; the sale contemplated by section 33 and referred to by the Privy Council in *Govind Lal Roy* v. *Ramjanam Misser*, I. L. R., 21 Calc., 70, is a public sale held at a place prescribed by the proper authorities at which there are bidders and a possibility of competition. GOSSAIN CHUTTURBHOOJ DUT *v.* ISHRI MUL 844

PAGE

Sale for Arrears of Revenue—*Act XI of 1859, ss. 17, 25, and 33—Bengal Act VII of 1868—Suit to set aside sale—Exemption from sale of land under attachment by Collector—Bengal Cess Act (Bengal Act IX of 1880)—Omission to specify ground of objection in revenue appeal.*] An estate sold for arrears of revenue had been previously brought to a judicial sale by a mortgagee, whose charge preceded that of a puisne incumbrancer, whom the present plaintiffs represented. It was not the consequence of the execution sale that puisne incumbrancers, who were not parties to the prior mortgagee's suit, were displaced, or left with nothing but a claim against the surplus proceeds of the sale, if any; and, on the facts, the present plaintiffs had a mortgagee's interest in the estate sold by the Collector, entitling them to sue to have the sale for default in payment of revenue set aside, as contrary to Act XI of 1859. A sale for arrears of revenue, if for arrears which have accrued while the land has been subject to an order issued by the Collector under the Cess Act (Bengal Act IX of 1880), for the levy of road cess in arrear, is contrary to section 17 of Act XI of 1859; such an order being an attachment within the meaning of that section. But, under section 33 of that Act, in every case where a sale for arrears of revenue is impeached, as being contrary to the provisions of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner under section 25. The above provision in section 33 applies where the sale has been irregularly conducted, and also where the sale has been illegal in consequence of an express provision for exemption of the land from sale for arrears having been contravened. *Lala Gauri Sanker Lal v. Janki Pershad*, I. L. R., 17 Calc., 809; L. R., 17 I. A., 57, referred to. GOBIND LAL ROY v. RAMJANAM MISSER 70

——————*Act XI of 1859, s. 36—Suit to oust certified purchaser.*] A purchased a mehal in the name of B's brother and obtained possession. He then sued B who was acting as his *tehsildar*, for an account and for delivery of certain papers connected with that mehal. *Held*, that the terms of section 36 of Act XI of 1859 did not apply to bar the suit. BRINDABUN CHUNDER NUNDI v. RAM SUNDER MOZUMDAR ... 375

——————*Suit to set aside sale—Notice of sale, Publication of—Act XI of 1859, ss. 5 and 7.*] Where it was contended that a sale under Act XI of 1859 was bad on the ground that the notices prescribed by sections 5 and 7 of that Act were not published, *held*, that there being no subsisting attachment on the property at the time it was sold, omission to issue notice under section 5 did not vitiate the sale. *Held* that, in the absence of proof that the plaintiff had sustained substantial injury on account of the omission to issue notice under section 7, such omission did not invalidate the sale. MAHOMED AZHAR v. RAJ CHUNDER ROY. 354

——————*Sunset Law—Bengal Act VII of 1868, s. 11—Revenue Sale Law (Act XI of 1859), s. 6.*] Section 11 of Bengal Act VII of 1868 makes the Sunset Law, as enacted in section 6 of Act XI of 1859, applicable to sales of tenures under the former Act. The refusal therefore of the Collector to accept payment of the amount due when tendered after sunset on the latest day for payment does not make the sale under Bengal Act VII of 1868 illegal. AZIMUDDIN PATWARI v. SECRETARY OF STATE FOR INDIA ... 360

——————**Validity of.**

See RIGHT OF SUIT 235

Sale for arrears of road cess. *See* BENGAL TENANCY ACT, s. 3 ... 722

Sale in execution of decree. *See* CIVIL PROCEDURE CODE, s. 310A ... 940

——————*Civil Procedure Code, 1882, ss. 274 287, 289, 290, and 311—Material irregularity—Proof of substantial injury.*] The non-compliance with the requirement of section 290 of the Civil Procedure Code that before sales of immoveables in execution of decree thirty days should intervene between proclamation and sale, is a material irregularity within the meaning of section 311. But its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. As to this the latter section requires affirmative evidence. TASADUK RASUL KHAN v. AHMAD HUSAIN 66

——————*Decree obtained by fraud—Suit to set aside decree and sale in execution on the ground of fraud—Fraud—Civil Procedure Code, 1882, ss. 108 and 244.*] A suit will lie to set aside a decree and a sale held in execution of such decree, when both the sale and the decree are impeached on the ground of fraud. *Mohendra Narain Chaturej v. Gopal Mondul*, I. L. R., 17 Calc., 769, and

PAGE

Sale in execution of decree—*continued.*

Jagan Nath Gorai v. *Watson*, I. L. R., 19 Calc., 341, distinguished. ABDUL MAZUMDAR v. MAHOMED GAZI CHOWDHRY ... 605

——————*Rateable distribution—Attachment of salary—Civil Procedure Code*, 1882, *ss.* 285, 295—*Attachment by Small Cause Court—Transfer of decrees to superior Court.*] Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution proceedings to the superior Court, adopted and held supported by the cases of *Gopee Nath Acharje* v. *Achoka Bibee*, I. L. R., 7 Calc., 553; *Bykant Nath Shaha* v. *Rajendro Narain Rai*, I. L. R., 12 Calc., 333; and *Bhugwan Dass Bogla* v. *Bunko Behary Bajpie*, Suit No. 130 of 1884, unreported. *Muttalagiri Nayak* v. *Muttayyar*, I. L. R., 6 Mad., 351, and *Nimbaji Tulsiram* v. *Vadia Venkatt*, I. L. R., 16 Bom., 683, not followed. CLARK v. ALEXANDER ... 200

——————**Application to set aside.** *See* SECOND APPEAL 799

——————**for rent.** *See* APPEAL 825

——————**Order setting aside.** *See* SECOND APPEAL ... 789

Sale of mortgaged property in execution of money decree. *See* TRANSFER OF PROPERTY ACT, S. 99 34

Sale under agreement sanctioned by Court. *See* CIVIL PROCEDURE CODE, S. 295 809

Sale Certificate. *See* PUBLIC DEMANDS RECOVERY ACT, S. 2 350

Sale Proceeds, Distribution of. *See* CIVIL PROCEDURE CODE, S. 295 ... 809

Sanction of Court, Attachment made without. *See* ATTACHMENT ... 86

Second Appeal—*Bengal Tenancy Act, Chapter X, ss.* 104, *clause* 2, 106, 107, 108, *clause* 2—*Dispute as to entries in record of rights—Question as to status of ryots—Order of Special Judge on appeal from Settlement Officer—Civil Procedure Code, s.* 622.] Under Chapter X of the Bengal Tenancy Act there is to be—(1) a framing of the record of rights, (2) a draft publication for a period of one month during which time objections may be preferred, and (3) a final publication, previous to which publication "disputes" as to the correctness of the entries in the record of rights, other than entries of rents settled, are to be heard and decided. Under section 107 the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of decrees, and under section 108, clause 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer; but it is only in cases under section 106, decided by the Special Judge on appeal from the Settlement Officer, that a second appeal lies to the High Court, and such cases can only relate to disputes regarding the correctness of entries other than the entries of rent settled. Where a decision of the Settlement Officer in a case under section 104, clause 2, of the Act dealt with the question of the *status* of the ryots, and was passed before the record had been framed; and after the record had been framed there was no dispute as to correctness of any entry, except the entries of the rent settled: *Held*, that the order of the Special Judge on appeal from such decision of the Settlement Officer was not one passed in a case under section 106 and therefore no second appeal lay from it to the High Court. *Shewbarat Koer* v. *Nirput Roy*, I. L. R., 16 Calc., 596, and *Lala Kirat Narain* v. *Pulakdhari Pandey*, I. L. R., 17 Calc., 326, referred to. *Held* also that the case was not one which required the interference of the High Court under section 622 of the Civil Procedure Code. GOPI NATH MASANT v. ADOITA NAIK 776

——————*Bengal Tenancy Act (VIII of* 1885), *ss.* 106, 108—*Special Judge, Order of—Boundary dispute—Bengal Survey Act (Bengal Act V of* 1875), *Part V, s.* 40—*Settlement Officer acting as Survey Officer.*] A second appeal only lies to the High Court under section 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under section 106 of the Act. No second appeal, therefore, lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (Bengal Act V of 1875.) The Court declined to interfere under section 622 of the Civil Procedure Code, being of opinion that the Settlement Officer had power under section 189 (*b*) of the Bengal Tenancy Act, and Rule 1, chapter VI of the Government rules under the Tenancy Act to act as he had done, and that therefore in holding that no appeal

PAGE

Second Appeal—*continued.*

lay to him, the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised. IRSHAD ALI CHOWDHRY *v.* KANTA PERSHAD HAZAREE 935

——— *Civil Procedure Code, 1882, ss. 588, 622—Appeal from order—Order passed in appeal reversing lower Court's order setting aside a sale in execution of decree—Sale in execution of decree setting aside sale—Material irregularity—Inadequacy of price—Revisional power of High Court.*] Under the provisions of section 588 of the Code of Civil Procedure no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity. A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published, and that it referred to only 5 *bighas* instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved, and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment-debtor, having appealed to the High Court against the order of the District Judge, and failed in such appeal by reason of no second appeal lying from such order, applied to the High Court under the provisions of section 622 of the Code to have the order set aside. *Held*, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section. GOPI KORRI *v.* GOPI LAL 799

——— *Grounds of appeal—Civil Procedure Code (Act XIV of 1882), s. 584.*] The Court of first instance accepted as correct a boundary line mapped by an Amin, dividing the estates of the opposite parties. The lower Appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return, which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and reversed the judgment of the Court below. *Held*, that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect, within the meaning of section 584 of the Civil Procedure Code, which contained the only grounds of second appeal. LUKHI NARAIN JAGADEB *v.* JODU NATH DEO 504

——— *Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882) ss. 586, 646 B.*] Notwithstanding section 16 of the Provincial Small Cause Courts Act, the High Court has, on a case being submitted to it under section 646B Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *held*, on a second appeal to the High Court that section 646B of the Civil Procedure Code must be read with section 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken in appeal to the District Court: both parties having submitted to the jurisdiction, it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void. SURESH CHUNDER MAITRA *v.* KRISTO RANGINI DASI 249

——— *Order setting aside sale under s. 294, Civil Procedure Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civil Procedure Code, 1882, ss. 244, 588.*] No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under section 294 of the Civil Procedure Code, notwithstanding that section 244 bars a separate suit in such a case; that section (244), whilst it precludes a right of suit, does not enlarge the right of appeal, which is limited strictly by section 588. BHAGBUT LALL *v.* NABKU ROY ... 789

PAGE

Secunderabad, Cantonment of. *See* SECURITY FOR COSTS 177

Security for Costs. *See* LETTERS PATENT, HIGH COURT, CL. 15 473

——— *Civil Procedure Code (Act XIV of 1882) s. 380—Cantonment of Secunderabad.*] For the purposes of section 380 of the Code of Civil Procedure, the British Cantonment of Secunderabad is a place out of British India. HOSSAIN ALI MIRZA *v.* ABID ALI MIRZA ... 177

——— *Civil Procedure Code, 1882, s. 380—Suit for amount of legacy under will—Suit in nature of administration suit—Discretion of Court under s. 380—Interpretation of Acts—"May"—"Shall."*] The power given to the Court under section 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought, or ought not, to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. *Degumbari Debi* v. *Asshotosh Banerjee*, I. L. R., 17 Calc., 613, approved of. Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's costs: *Held*, that the Court would not order the plaintiff, although she was not in possession of any immoveable property within British India, to give security for the costs of the suit. A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property does not become thereby "possessed of immoveable property" within the meaning of section 380. IN THE GOODS OF PREMCHAND MOONSHEE. BIDHATREE DASSEE *v.* MUTTY LALL GHOSE 832

——— *Civil Procedure Code (Act XIV of 1889) s. 549—Property of appellant—Ground for ordering security for costs of appeal.*] Under the circumstances of this case the Court refused an application that the appellant, on the ground that he was a person without means, should give security for the costs of the appeal, HEWETSON *v.* DEAS ... 526

PAGE

Select Committee, Report of, on bill. *See* ADMINISTRATOR-GENERAL'S ACT, S. 31 732

Sentence given before completion of judgment. *See* CRIMINAL PROCEEDINGS 121

Separate Suit. *See* CIVIL PROCEDURE CODE, s. 244 437

——— *See* MESNE PROFITS ... 989

Set-off—*Presidency Towns Small Cause Court Act (XV of 1882), s. 18, Explanation I—"Admitted set-off"—Debt—Civil Procedure Code (Act XIV of 1892), s. 111—Jurisdiction.*] The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to Rs. 2,148, but they deducted from this sum of Rs. 2,148, by way of set-off, a sum of Rs. 500, which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim to Rs. 1,648. The defendant admitted that the Rs. 500 was due to him by the plaintiffs, but did not, either before suit or at the trial, agree to its being set-off against the plaintiffs' claim. *Held* by MACPHERSON and TREVELYAN, JJ., (PETHERAM, C.J., dissenting) that the sum of Rs. 500 could not, under explanation I of section 18 of Act XV of 1882, be set off, and that the suit must be dismissed as being beyond the jurisdiction of the Court. RAMDEO *v.* POKHIRAM ... 419

Settlement of Chowkidari Chakran Land. *See* LIMITATION ACT, 1877, Art. 14 626

Settlement Officer acting as Survey Officer. *See* SECOND APPEAL ... 935

——— **Decision of.** *See* BENGAL TENANCY ACT, ss. 101, 102 ... 378

——— **Order of Special Judge on appeal from.** *See* SECOND APPEAL 776

——— **Power of.** *See* BENGAL TENANCY ACT, ss. 101, 102 88

Settlement Proceedings, Procedure when none in operation. *See* BENGAL TENANCY ACT, s. 158 ... 807

Share of Estate, Proceedings against when in arrear *See* SALE FOR ARREARS OF REVENUE 844

Small Cause Court, Attachment by. *See* SALE IN EXECUTION OF DECREE ... 200

PAGE

Small Cause Court, Decree of, Suit in Recorder's Court to set aside ... 612

Small Cause Court, Mofussil. *See* SECOND APPEAL 249

——————Mofussil, Jurisdiction of—*Suit to establish right to crops on basis of title to land on which they are grown—Question of title.*] A suit to establish the plaintiff's right to a standing crop on the basis of his title to the land is an ordinary civil suit, and not a suit of a Small Cause Court nature. *Godha* v. *Naik Ram*, I. L. R., 7 All., 152, and *Shiboo Narain Singh* v. *Mudden Ally*, I. L. R., 7 Calc., 608, relied on. DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY ... 430

——————Presidency Towns. *See* CIVIL PROCEDURE CODE, s. 108 ... 269

Jurisdiction of. *See* SET-OFF ... 419

Special Judge, Order of. *See* SECOND APPEAL 935

——————on appeal from Settlement Officer. *See* SECOND APPEAL 776

——————Power of. *See* BENGAL TENANCY ACT, s. 108 521

Stamp Act (I of 1879), Schedule I, Art 29 and 44 (b)—*Mortgage advance payable on demand—Power of sale in default of repayment of advance.*] In consideration of an advance of Rs. 1,450, on interest, repayable on demand, certain boat-owners assigned to *S. & Co.* their paddy boats, the boat-owners retaining working and being responsible for the safety of the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to *S. & Co.*, and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by *S. & Co.* On failure to make repayment on demand, *S. & Co.* were empowered to take possession and to sell the boats, *Held*, that the document was a mortgage and not a pledge, and as such should be stamped under article 44 (*b*) of Schedule I of the Stamp Act of 1879 IN THE MATTER OF KO SHWAY AUNG v. STRANG STEEL AND CO. 241

Statement while in custody of Police. *See* EVIDENCE 392

Statute 4. Geo. IV., Cap. 34, s. 3. *See* CRIMINAL BREACH OF CONTRACT ... 262

PAGE

Statute 11 and 12 Vict., c. 21. *See* INSOLVENT ACT 634

——12 and 13 Vict., c. 106, s. 65. *See* INSOLVENT ACT, s. 60 1018

——17 and 18 Vict, c. 104. *See* MERCHANT SHIPPING ACT, 1854 ...

——18 and 19 Vict., c. 91. *See* MERCHANT SHIPPING ACT, 1855 ...

——37 and 38 Vict., c. 27. *See* COURTS COLONIAL JURISDICTION ACT, 1874 ... ...

Statutes, Construction of. *See* CIVIL PROCEDURE CODE, s. 310A 940

———————*See* SECURITY FOR COSTS 832

Statutory right, Effect on, of repeal of Act which gives it. *See* BENGAL TENANCY ACT, s. 19 129

Staying proceedings pending Appeal. *See* PRACTICE 561

Step in aid of execution. *See* LIMITATION ACT, ART. 179 (4) 23

Stolen Property—*Dishonestly retaining stolen property—Penal Code, s. 411—Legal presumptions.*] Where a document, purporting to be a Collectorate notice forming part of a record and found by the Court to be genuine, was discovered to be in the possession of persons charged with retaining stolen property, it was held that, in a matter of this kind, it was right to raise legal presumptions arising out of the ordinary course of business and to dispense with direct evidence of the document having been actually on the record or stolen from it. Though it be true that, before a man can be convicted of receiving stolen property knowing it to be stolen, it must be shown that property has been stolen, *held* that the disappearance of the document from the record *plus* the substitution of an imitation of it in its place, showed that it must have been taken with a dishonest object. ISHAN CHANDRA CHANDRA v. QUEEN-EMPRESS ... 328

Stridhan. *See* HINDU LAW, STRIDHAN ... 344

Sub-contract. *See* CONTRACT 173

Substantial injury. Proof of. *See* SALE IN EXECUTION OF DECREE 66

Succession. *See* HINDU LAW, STRIDHAN ... 344

PAGE

Succession of Mahomedan widow by local custom to life interest in estate of her husband. *See* RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM 157

Succession to property among Kanchans. *See* MAHOMEDAN LAW, CUSTOM 149

Succession to property of degraded and outcaste woman. *See* PROBATE. 697

Succession Act (X of 1865), ss. 179, 187, 191. *See* ADMINISTRATOR-GENERAL'S ACT S. 31 732

Suit by some of a class as representatives of class. *See* PARTIES ... 180

Suit on behalf of person alleged to be but not in fact a Minor. *See* MINOR 866

Summons, Issue of. *See* PARDANASHIN LADY 588

Sunset Law *See* SALE FOR ARREARS OF REVENUE 360

Superintendence of High Court. *See* APPEAL. 539

——————————— *See* SECOND APPEAL.... 799

Supplemental Suit, Remedy by. *See* COSTS. 904

Survey Officer, Settlement Officer acting as. *See* SECOND APPEAL ... 935

Taluk inherited by daughter's son. *See* OUDH ESTATES ACT, S. 22 997

Tax. *See* BENGAL MUNICIPAL ACT, S. 85 ... 319

Tender. *See* CONTRACT 173

Tenure, Transfer of. *See* LANDLORD AND TENANT 433

Testamentary Guardians. *See* GUARDIAN 206

Testator, Intention of. *See* WILL ... 488

——**Mental capacity of.** *See* WILL 279

Title, Grant of administration without determining. *See* LETTERS OF ADMINISTRATION 344

——**Proof of.** *See* POSSESSION ... 244

——**Question of.** *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF .. 430

PAGE

Trader. *See* INSOLVENT ACT, S. 60 1018

Transfer of Criminal Case—*Ground for transfer—Probability of unfair trial——Complexity of case—Transfer from one Magistrate to another—Local inquiry—Magistrate collecting evidence on local enquiry—Magistrate trying case, Competency of, to be witness—Competent witness—Examination of Magistrate trying case as a witness.*] Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity arising out of disputed boundaries to land in which the accused were charged with rioting, trespass, mischief and theft, and where, in the course of such investigation, he held a local inquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which, by reason of the way it was acquired, he could not properly or legally consider in arriving at an ultimate decision of the case, (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercising judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record, and the Assistant Magistrate tender himself while trying the case as a witness to be cross-examined by either the prosecution or the defence: *Held* that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case, but that it must be transferred to some other Magistrate exercising first class powers for disposal. Powers of Magistrates to hold local investigations and the nature of such investigations discussed. Whenever it is desirable for a Magistrate to view the place at which an occurrence, the subject-matter of a judicial investigation before him, has taken place, he should be careful to confine himself to such a view of the place as to enable him to understand the evidence placed before him, and should take care that no information reaches him with reference to the occurrence which he has to investigate beyond what he acquires by that view, and if the place of the occurrence be in dispute he would be wise in postponing his visit till

PAGE

Transfer of Criminal Case—*continued.*

all the evidence has been recorded, if under such circumstance he feels disposed to visit it at all. But where a local inquiry by a Magistrate takes the form of an investigation into the occurrence on the site of the occurrence instead of in his own Court, and he takes evidence on the spot, such evidence should not be recorded unless it is protected by all the safeguards by which evidence, on which a Judge may act, is protected by law. HARI KISHORE MITRA *v.* ABDUL BAKI MIAH ... 920

Transfer of decrees to superior Court.
See SALE IN EXECUTION OF DECREE ... 200

Transfer of Property Act (IV of 1882), ss. 3 and 85. *See* PARTIES ... 116

---

s. 88. *See* INTEREST 274

---

ss 88, 90—*Decree not satisfied after sale of mortgaged property—Procedure necessary to obtain balance of decree*] Where a decree-holder has obtained a decree under section 88 of the Transfer of Property Act, and on sale of the mortgaged property the proceeds of sale are insufficient to satisfy the decree, he must, unless the decree gives him the right to proceed against other property or against the person of his judgment-debtor, apply under section 90 of the Act for a decree for the balance remaining unsatisfied. LALLA TIRHINI SAHAI *v.* LALLA HURRUK NARAIN 26

---

s. 89. *See* CIVIL PROCEDURE CODE, s. 235 818

---

ss. 99 and 67—*Sale of mortgaged property in execution of money decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.*] A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. Section 99 of the Transfer of Property Act limits the right of a decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under section 67 of that Act. *Quære*—Whether the suit to be instituted under section 99 is a suit on the mortgage or is one on the charge created by attachment. JADUB LALL SHAW CHOWDHRY *v.* MADHUB LALL SHAW CHOWDHRY ... 34

PA

Transfer of Property Act (IV of 1882), s. 135 (cl. d.)—*Actionable claim—Mortgage bond.*] *Per* PETHERAM, C.J., NORRIS, O'KINEALY, and GHOSE, JJ., (PRINSEP, J., dissenting).—The right to recover a loan secured by a mortgage of immoveable property is an "actionable claim" within the provisions of section 135 of the Transfer of Property Act. *Per* PETHERAM, C.J., NORRIS and GHOSE, JJ.—Where an actionable claim has been assigned, the debtor may be discharged from all liability by payment to the buyer of the price and incidental expenses of the sale with interest on the price from the date that the buyer paid it; provided that such payment is made at any time before a judgment of a competent Court has been delivered affirming the claim, or before the claim has been made clear by evidence and is ready for judgment; but if such payment is not made before the period mentioned the assignee is entitled to judgment for the whole debt. *Per* PRINSEP, J.—The provisions of section 135, clause (*d*), refer to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. *Jani Begam* v. *Jahangir Khan*, I. L. R., 9 All., 476, and *Nilakanta* v. *Krishnasami*, I. L. R., 13 Mad., 225, approved of. *Rajendro Narain Bagchi* v. *Watson & Co.*, I. L. R., 18 Calc., 510, referred to. *Per* O'KINEALY, J.—Clause (*d*) of section 135 refers to circumstances arising before the transfer of the actionable claim, and clauses (*a*), (*b*), and (*c*) refer to circumstances coming into existence at the time of the transfer. MUCHIRAM BARIK *v.* ISHAN CHUNDER CHUCKERBUTTY ... ...

---

s. 135—*Mortgage—Actionable claim—Assignment of mortgage—Liability of mortgagor—Steps to be taken by mortgagor to obtain benefit of section* 135.] A mortgage is an actionable claim under section 135 of the Transfer of Property Act. In order to obtain the benefit of that section the mortgagor must pay "the price and incidental expenses, &c., with interest" into Court either or before the action. *Muchiram Barik* v. *Ishan Chunder Chuckerbutty*, I. L. R., 21 Calc., 568, followed. Where a mortgagor some months after suit was brought tendered the amount due, on the assignment of the mortgage, to the assignee, and the tender was refused and no actual payment was made into Court: *Held* by PETHERAM, C.J., NORRIS and O'KINEALY, JJ.,

PAGE

Transfer of Property Act (IV of 1882) —*contd.*

affirming the judgment of HILL, J.) that under the circumstances the mortgagor was not entitled to the benefit of section 135. RUSSICK LALL PAL *v.* ROMANATH SEN 792

Transfer to Administrator-General by Hindu Executor. *See* ADMINISTRATOR-GENERAL'S ACT, S. 31 732

Trespass. *See* CALCUTTA MUNICIPAL CONSOLIDATION ACT. 1888, S. 2 ... 528

Trespasser in possession, Rights of true owner against. *See* RIOTING ... 392

Trust for Maintenance. *See* HINDU LAW, WILL 683

"Ultra Vires." *See* BENGAL MUNICIPAL ACT, 1876, S. 313 837

Usufructuary Mortgage. *See* MORTGAGE 882

Verification of plaint by Acting Manager of Bank. *See* PLAINT ... 60

Voluntary payment—*Money paid for benefit of another—Payment of revenue by the claimant of an estate while temporarily holding it under a decree in his favour, afterwards reversed—Liability of owner for money so paid for his benefit.*] Where a claimant having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses (in default of which payment the estate would have been sold), although the decree may have been reversed afterwards, and he may have been deprived of possession, he nevertheless is entitled to be repaid the amount by his opponent, who benefits by it, provided that he has not realized, or failed, through any fault of his own, to obtain enough out of the rents and profits during his possession to cover this expenditure. The plaintiff had paid revenue and cesses in such a case. *Held*, that on his accounting for mesne profits and all that he had received, or might have received, from the estate, he should recover from the defendants, in whose favour the decree was ultimately made, the difference between his, the plaintiff's, payments and receipts. DAKHINA MOHAN ROY *v.* SARODA MOHAN ROY 142

Waiver. *See* ARBITRATION 590

——**Right of.** *See* LIMITATION ACT, 1877, ART. 179 542

Warrant Case. *See* PARDANASHIN LADY 58

PAGE

Waste Land Grants. *See* MORTGAGE ... 882

Widow. *See* HINDU LAW, WIDOW ... 190

Will—*Construction of will—Joint tenancy in fee—Life estate—Intention of testator—Restricted enjoyment, Direction as to.*] A testator devised his estate, should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that, should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death her children and their descendants should take *per stirpes*; and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children, the testator's wife should take the whole estate. The testator's wife remained his widow until her death, her children having all predeceased her without being married. *Held*, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift. HALIBURTON *v.* ADMINISTRATOR-GENERAL OF BENGAL 488

——*Execution of will—Probate and Administration Act (V of 1881), s. 50—Evidence as to the execution of a will by a person near death.*] On a question of fact, raised in 1887, whether an alleged testator had or had not been able to duly execute his will, as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. The judgment of the High Court, which would have revoked the probate granted in 1882, was reversed, upon the consideration of conflicting evidence as to the mental capacity of the testator, and as to the genuineness of his signature. ROMESH CHUNDER MUKERJI *v.* RAJANI KANT MUKERJI ... ...

——*Execution of will—Proof of due execution of will where the mental capacity of testator is in dispute—Rules for decision*

PAGE

Will—*continued.*

of such cases—Presumption—Duty of Appellate Court in deciding on evidence of witnesses.] In all cases in which the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value where there is conflict between them as to the mental capacity of a person whose conduct they have observed, and whose state of mind they depose to: for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, *viz.*, power of observation, power of judgment, accuracy of expression, and general intelligence which are of special importance in cases where the execution of a will is disputed on the ground that at the time the will was alleged to have been made, the mental capacity of the testator was such that it was doubtful whether the will could have been "duly executed." "Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorizing, the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved of the contents of the will. Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption: ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence, which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have "duly executed" the will as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. Where this had not been done, the Appellate Court, after considering the whole evidence, held, contrary to the decision of the lower Court, that the will was not proved, and refused probate. WOOMESH CHUNDER BISWAS *v.* RASHMOHINI DASSI 279

PAGE

Will—*continued.*

Will, Construction of. *See* HINDU LAW, WILL 683

Withdrawal of suit—*Civil Procedure Code (Act XIV of 1882), ss. 13 and 373—Institution of fresh suit—Res judicata.*] Where *A* instituted a suit to establish his right to sell certain property in satisfaction of a decree against *B*, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted another suit to establish his right to sell the same property in satisfaction of another decree against *B*, *held*, that the second suit was not barred by the provisions of section 373 of the Code of Civil Procedure. Explanation III of section 13 of the Civil Procedure Code contemplates a decree which does not expressly grant the relief claimed: the termination of a suit by the plaintiff being allowed to withdraw it, without leave to bring a fresh one, is not a bar under Explanation III to a subsequent suit in which the same matter is in issue. KAMINI KANT ROY *v.* RAM NATH CHUCKERBUTTY 265

——*Civil Procedure Code (Act XIV of 1882), s. 373—Applicability of s. 373 to suits under Act X of 1859.*] Section 373 of the Code of Civil Procedure (as to withdrawing suits with liberty to bring a fresh suit) does not apply to suits under Act X of 1859, which is a complete Code in itself. MOKUNDA BULLAV KAR *v.* BHOGABAN CHUNDER DAS 514

——*Civil Procedure Code (Act XIV of 1882), s 373—Withdrawal of suit without permission to bring fresh suit—Application of the Civil Procedure Code to suits in Revenue Courts—Act X of 1859.*] Section 373 of the Civil Procedure Code (Act XIV of 1882) does not apply to suits before the Revenue authorities under Act X of 1859, that Act being a complete Code in itself. RADHA MADHUB SANTRA *v.* LUKHI NARAIN ROY CHOWDHRY 428

Witness—*Examination of witness—Cross-examination—Right of co-accused to cross-examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.*] One accused person may cross-examine a witness called by another co-accused for